90-1923

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

No. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

SANDRA FAUCHER, ET AL., RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 19, 1991

QUESTIONS PRESENTED

Whether this Court's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), deprives the Federal Election Commission of authority to promulgate a regulation implementing Congress's expressed intention that 2 U.S.C. § 441b require corporations and unions to finance the public dissemination of voter guides indicating support for, or opposition to, the positions of clearly identified federal candidates from separate segregated funds rather than from corporate or union treasuries.

STATEMENT NAMING ADDITIONAL PARTY

The only named party to this case not reflected in the caption is respondent Maine Right to Life Committee, Inc.

Richard Thornburgh in his official capacity as Attorney General of the United States was originally named a defendant and filed a motion to dismiss, but did not participate in the proceedings before the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in *Sandra Faucher, et al. v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991).

OPINIONS BELOW

The March 21, 1991, decision and judgment of a panel of the court of appeals affirming the district court's judgment is published at 928 F.2d 468 (1st

Cir. 1991), and appears at Appendix ("App.") A. The June 29, 1990, findings of fact and conclusions of law of the United States District Court for the District of Maine and the July 2, 1990, final judgment of that court declaring 11 C.F.R. § 114.4(b)(5)(i) invalid are published at 743 F. Supp. 64 (D.Me. 1990) and appear at App. B.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1991. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case concerns provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. §§ 431-455,[1] specifically 2 U.S.C. § 441b, and a regulation implementing that section, 11 C.F.R. § 114.4(b)(5)(i). For the Court's convenience, 2 U.S.C. § 441b is set forth in its entirety at App. C and 11 C.F.R. § 114.4(b)(5)(i) is set forth at App. D.

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[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565; by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357; by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 662, 663 (1988); by Pub. L. No. 101-194, Title VI, Sec. 601(b)(1), 103 Stat. 1762 (1989); and by Pub. L. No. 101-280, Sec. 7(b)(1), 104 Stat. 161 (1990).

STATEMENT OF THE CASE

A. The Act

The Commission is the independent agency established by Congress to administer the Act, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. Congress granted the Commission exclusive jurisdiction over civil enforcement of these three statutes, which together create a comprehensive regime regulating the financing of federal election campaigns, including contribution and expenditure limitations, disclosure requirements, and public funding of presidential campaigns. Congress specifically authorized the Commission to "formulate policy with respect to [the Act]," 2 U.S.C. § 437c(b)(1), and to make "such rules . . . as are necessary to carry out the provisions" of the statutes it administers, 2 U.S.C. §§ 437d(a)(8), 438(a)(8).

The Act contains a special scheme, originally enacted as an independent statute before the rest of the Act was devised, for the regulation of election contributions and expenditures by corporations and labor organizations. This special scheme, now codified at 2 U.S.C. § 441b, prohibits corporations and unions from using their general treasury funds to make any "contribution or expenditure in connection with any [federal] election." In 1971 Congress adopted an amendment to this provision, now codified at 2 U.S.C. § 441b(b)(2)(C), that expressly allows corporations and unions to use their treasury funds to establish, administer, and solicit funds to "separate segregated fund[s] to be utilized for political purposes." A separate segregated fund consists of donations voluntarily

made by a restricted class of corporate employees and stockholders or members and the families of those individuals. A corporation may contribute no treasury monies to the fund, and the fund must be kept in an account separate from corporate treasury money. However, the corporation can exercise complete control over its separate segregated fund, including all decisions regarding the making of federal election contributions and expenditures from it. *FEC v. National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982).[2]

Although partisan communications to the general public must be financed from a separate segregated fund, the Commission's regulations permit the use of corporate and union treasury money to finance certain nonpartisan communications to the public in connection with federal elections. 11 C.F.R. § 114.4. The regulation at issue in this case permits such treasury funds to be used to "prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions." 11 C.F.R. § 114.4(b)(5)(i). That regulation lists six factors that the Commission considers in determining whether a voter guide is nonpartisan, including whether a question is worded in a way that supports the position of a candidate on the issue covered and whether an editorial position

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[2] Because the statutory definition of "political committee" includes separate segregated funds, 2 U.S.C. § 431(4)(B), they are governed by the same reporting, disclosure, and other requirements applicable to other political committees, *see, e.g.*, 2 U.S.C. §§ 432-434 and 441a, and can make unlimited independent expenditures communicating to the general public the corporation's views on candidates for federal office. *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976).

on the survey questions, or an expression of support for or opposition to any candidate, is included in the voter guide. 11 C.F.R. § 114.4(b)(5)(i)(A)-(F). These factors were derived in part from factors articulated by the Internal Revenue Service in Revenue Rulings 78-248 and 80-282. *Explanation and Justification*, 48 Fed. Reg. 50502 (1983).

B. Prior Proceedings

Respondent Maine Right to Life Committee, Inc. ("MRLC") is a nonprofit membership corporation incorporated in the State of Maine in 1974 to oppose abortion rights (App. 13a, 38a). Respondent Sandra Faucher is an MRLC corporate director (App. 13a). Since 1981, MRLC has operated a separate segregated fund, the "Maine Right to Life Political Action Committee" ("MRLCPAC"), which makes contributions to candidates (App. 14a, 38a).

MRLC uses corporate treasury funds to publish a bimonthly newsletter, the costs of which are partially defrayed by paid advertising from "pro-life" businesses (App. 14a, 39a). Of the approximately 10,000 copies printed of each issue, MRLC distributes about 5,300 copies free to the general public (App. 14a, 49a). Prior to elections in 1984, 1986, and 1988, MRLC included in its newsletter voter guides to federal and state candidates (App. 14a, 38a).

In 1989, MRLC requested an advisory opinion from the Commission under 2 U.S.C. § 437f.[3] MRLC stated

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[3] In 1985, MRLC and Faucher had brought a similar declaratory judgment action against the FEC. On February 24, 1989, the district court dismissed that action for lack of ripeness, in part because MRLC and Faucher had not requested an advisory opinion from the Commission as to whether their planned activities were prohibited. *Faucher v. FEC*, 708 F. Supp. 9 (D. Me. 1989).

that it wished to continue printing and distributing to the public pre-election editions of its newsletter containing voter guides similar to those that it had produced in prior years. The costs would again be paid from MRLC's general treasury funds, not from MRLCPAC funds. MRLC asked whether the Act and Commission regulations would permit the proposed activity (App. 13a, 41a).

In the Commission's response, Advisory Opinion 1989-28, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5978 (February 14, 1990), it concluded, *inter alia*, that although corporate expenditures for a guide like MRLC's 1984 voter guide would not be prohibited, expenditures for a guide like MRLC's 1988 general election voter guide would be prohibited. Because the 1988 guide stated the corporation's support for the positions of certain clearly identified candidates, the Commission concluded that distribution to the public of a voter guide containing partisan election messages similar to those in MRLC's 1988 voter guide could not lawfully be financed with corporate funds (App. 48a).

In April 1990, MRLC and Faucher filed their complaint in this case. They alleged that they intended to publish in the May 1990 edition of their newsletter a voter guide that would be substantially similar to the one published in their November 1988 issue. They asserted that the wording of the questions presented to the candidates might favor a particular response, that the voter guide might include editorial positions on the issues presented to the candidates, and that the guide might indicate support for or opposition to the position of particular candidates on "pro-life" issues included in the candidate survey. (App. 15a, 23a.) The primary relief sought was a judicial dec-

laration that 11 C.F.R. § 114.4(b)(5)(i) was invalid as inconsistent with the construction of 2 U.S.C. § 441b stated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). (App. 3a-4a, 15a-16a.)

C. The District Court's Decision

The district court concluded that it had jurisdiction under 28 U.S.C. § 1331 to review the Commission's regulation (App. 16a-17a). The court found that 2 U.S.C. § 441b(a) "on its face" prohibits a corporation like MRLC from expending its treasury funds to publish voter guides of the sort it proposed (App. 18a), but concluded that it was bound by this Court's construction of section 441b in *Massachusetts Citizens for Life*, which narrowed the provision's broad wording to apply only to expenditures for communications that "expressly advocate" the election or defeat of a "clearly identified candidate" (App. 18a). The regulation of voter guide expenditures in 11 C.F.R. § 114.4(b)(5)(i) would, in the court's opinion, restrict corporate financing of some communications that do not contain "express advocacy" (App. 20a). Accordingly, the court declared the regulation "invalid as not authorized" by 2 U.S.C. § 441b as interpreted in *Massachusetts Citizens for Life* "to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are 'nonpartisan' in a broad sense that includes issue advocacy rather than the narrower test of 'express advocacy'" (App. 28a).[4]

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[4] MRLC and Faucher did not appeal the district court's refusal, on the ground of lack of ripeness, to grant them declaratory and injunctive relief with respect to MRLC's proposed 1990 publication (App. 22a-26a). Nor did they appeal

D. The Court of Appeals's Decision

Like the district court, the court of appeals acknowledged that "[o]n its face, the statute appears to allow for a very broad application" (App. 6a). It stated that, nonetheless, section 441b's prohibition was limited to expenditures for "express advocacy" (App. 6a). The court did not analyze either the language or the legislative history, nor did it consider whether such a construction furthered the statute's purposes. Instead, it simply found *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Massachusetts Citizens for Life* to be controlling (App. 6a-7a).

The court then found that 11 C.F.R. § 114.4(b)(5)(i) did not come within the statute as thus narrowed, interpreting the regulation as restricting "issue advocacy" as well as "express advocacy" (App. 8a, 9a). Concluding that *Massachusetts Citizens for Life* had reaffirmed that application of the Act was limited to "express advocacy" in order to safeguard "issue advocacy," the court upheld the district court's judgment that the Commission's regulation was invalid as unauthorized by 2 U.S.C. §441b.

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the court's findings (App. 20a-22a) that they lacked standing to challenge 11 C.F.R. § 114.4(b)(5)(i) on other grounds and also lacked standing to challenge the constitutionality of 11 C.F.R. § 114.4(b)(5)(ii), a voter guide regulation inapplicable to MRLC.

REASONS FOR GRANTING THE WRIT

In 2 U.S.C. § 441b, Congress required corporations and unions to finance their expenditures "in connection with" federal elections from a separate segregated fund made up of voluntary contributions given by their constituents for political purposes. This Court has repeatedly found that this limitation serves the vital national interest in protecting federal election campaigns from "the corrosive influence of concentrated corporate wealth" that would otherwise threaten "the integrity of the marketplace of political ideas." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986). "Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace" and "§ 441b seeks to prevent this threat to the political marketplace" because a separate segregated fund, "as opposed to the corporate treasury, in fact reflect[s] popular support for the political positions of the committee." *Id.* at 257-258. *See also Austin v. Michigan State Chamber of Commerce*, 110 S. Ct. 1391, 1397-1398 (1990). This Court has found that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . to account for the particular legal and economic attributes of corporations and labor organizations, warrants considerable deference." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)). *See also* p. 13, n.6, *infra.*

In *Massachusetts Citizens for Life*, 479 U.S. at 249, this Court stated in dictum—without any refer-

ence to the language, structure, legislative history, or purposes of the provision—that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." The court below—again without reference to the statute's language, structure, legislative history or purposes—has now relied upon that statement to hold that the Commission lacks power under the Act to adopt a regulation permitting corporate and union treasury funds to be used to distribute to the public a comparison of the positions of clearly identified candidates in an upcoming election only if it is done in a nonpartisan way that is not crafted to express the corporation's support for, or opposition to, one of the competing candidates.

The court of appeals's decision, if allowed to stand, would significantly weaken the regulation of corporate and union intervention in federal elections that Congress has long found necessary to protect the integrity of the electoral process. It would enable corporations and unions, for the first time in more than four decades, to use unlimited amounts of treasury funds to influence the general public to elect their favored candidates. Moreover, the loophole created by this decision is not limited to small, nonprofit advocacy groups, but would permit the vast treasuries of major commercial interests and powerful international unions to be brought to bear to influence directly the outcome of federal elections.

We show below that section 441b was clearly intended to encompass corporate and union expenditures for public distribution of the sort of voter guides regulated by the Commission's rule, whether or not they constitute express advocacy, and that this narrowly defined rule does not implicate the vagueness

and overbreadth concerns that led this Court to adopt the express advocacy limitation. A statutory policy that has protected federal elections for more than forty years should not be eliminated through a process of statutory construction that completely ignores the provision's language, structure, and legislative history. The court of appeals's decision, voiding the Commission's authority to adopt specifically targeted regulations implementing clear congressional intent in enacting this statute to protect the integrity of the federal election process, presents a question of the highest national importance that fully warrants review by this Court.

I. SECTION 441b IS NOT LIMITED TO EXPENDITURES FOR "EXPRESS ADVOCACY"

The language, history, structure, and purposes of 2 U.S.C. § 441b clearly establish that Congress intended it to regulate some expenditures by corporations and unions that do not involve "express advocacy." In construing the provision, the court of appeals failed even to examine these controlling indicia of statutory interpretation. Instead, it relied on this Court's dictum in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." The traditional tools of statutory construction preclude this reading of the provision and no court may "judicially rewrit[e]" a statute to avoid constitutional questions. *CFTC v. Schor*, 478 U.S. 833, 841 (1986). *See also Rust v. Sullivan*, 59 U.S.L.W. 4451, 4456 (1991). The Court should, therefore, reconsider and overrule the statement in *Massachusetts Citizens for Life* that led to the decision below.

The language of 2 U.S.C. § 441b explicitly prohibits all expenditures financed by corporate or union treasury funds made "in connection with" any federal election. The court of appeals acknowledged (App. 6a) that, "[o]n its face, the statute appears to allow for a very broad application," and the district court agreed (App. 18a) that section 441b "on its face" extends to voter guides as defined in the Commission's regulation. The breadth of the section's language contrasts starkly with the narrowness of other provisions of the Act that Congress explicitly limited to "express advocacy" after *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* 2 U.S.C. §§ 431(9)(B)(iii), 431(17), and 441d(a). This contrast alone raises a strong inference that Congress did not intend to limit application of section 441b to expenditures for "express advocacy." *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The legislative history of section 441b confirms that Congress intended the section to reach beyond "express advocacy." Of particular importance here, the debate on the 1947 legislation that first extended the provision's coverage to "expenditures" clearly shows that Congress intended to prohibit corporations from using their corporate treasuries to help elect or defeat candidates by distributing "colored" comparisons of the candidates' records on issues. *See* 93 Cong. Rec. 6447 (1947) (remarks of Sen. Taft); 93 Cong. Rec. 6446-6447 (1947) (discussion among Sens. Taft, Taylor, and Ball); 93 Cong. Rec. 6447 (1947) (colloquy between Sens. Kilgore and Taft).[5] Only voting

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[5] In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 409 (1972), the Court found Senator Taft's explanation of the scope of this provision to be "controlling."

record publications limited to "bare statement[s] of actual fact" and "direct quotations" would fall outside the provision's prohibition. 93 Cong. Rec. 6447 (1947) (remarks of Sen. Taft). Limiting the statutory prohibition to explicit exhortations to vote for or against a candidate would remove the dissemination of such "colored" reports of voting records from the purview of the Act, and the courts cannot "interpret a statute so narrowly as to defeat its obvious intent." *United States v. Braverman*, 373 U.S. 405, 408 (1963).

In 1971, Congress adopted an amendment to the prohibition that directly conflicts with the conclusion that section 441b's prohibition is limited to expenditures for "express advocacy." The amendment retained the earlier language extending coverage to any expenditure "in connection with" a federal election. Representative Hansen, the amendment's sponsor, characterized this language as "plainly all-encompassing," and the prohibition it embodied as "the most far-reaching in the entire election law." 117 Cong. Rec. 43,380 (1971) (remarks of Rep. Hansen).

The underlying purpose of the amended prohibition was to prevent corporate and union treasuries from being diverted to federal electoral activities "both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen).[6]

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[6] This Court has repeatedly acknowledged the compelling importance of these intertwined objectives to preserving the integrity both of government and of the nation's electoral system—objectives articulated by generations of congressmen over decades of legislative adjustment of this important statute. *See, e.g., United States v. CIO*, 335 U.S. 106, 112-20

The Hansen amendment added an exception to the general prohibition, now codified at 2 U.S.C. § 441b (b)(2)(B), that permits corporations to use their treasury funds to conduct "nonpartisan" registration and get-out-the-vote drives among their internal constituents. However, the amendment does not permit the use of such funds for similar drives directed at the general public even if they are "nonpartisan." Representative Hansen emphasized repeatedly that "the amendment I propose insures that such a limitation would have to be observed." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen). *See also*, 117 Cong. Rec. 43,382, 43,385, 43,387, 43,390 (1971) (remarks of Rep. Hansen).[7] An "express advocacy" limitation in section 441b not only contravenes this explicit congressional intent, but renders section

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(1948); *United States v. UAW*, 352 U.S. 567, 569-87 (1957); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 402-31 (1972); *FEC v. National Right to Work Comm.*, 459 U.S. at 207-10; *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 246-50, 257-62; *Austin v. Michigan State Chamber of Commerce*, 110 S.Ct. at 1397-98.

[7] Rep. Hansen also explained that his amendment was only intended to permit registration drives that are "nonpartisan" in that they "make an effort to reach all those in the area and not merely those who will vote in a certain way. *A failure to respect this limitation would, of course, be a violation of section [441b].*" 117 Cong. Rec. 43,381 (1971) (emphasis added). He similarly made clear that under his amendment the provision was to govern the use of treasury funds even to transport individuals to the polls, without any discussion of candidates or political parties. *See* 117 Cong. Rec. 43,385 (1971) (discussion among Reps. Hansen, Hays, and Cabell); 117 Cong. Rec. 43,387-388 (1971) (discussion among Reps. Ashbrook, Hansen, and Hays). Thus, the amendment was clearly intended to prohibit at least some expenditures that involve no express advocacy at all.

441b(b)(2)(B) entirely superfluous, for by definition "nonpartisan" registration and get-out-the-vote drives could never involve express advocacy of a candidate's election or defeat. It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Finally, as we earlier noted, in 1976 Congress again chose to retain the broad prohibition in section 441b, when the provision was moved from the criminal code to Title 2, even though at the same time Congress changed several other provisions of the Act to limit them to "express advocacy" in the wake of *Buckley*. This action affirmed Congress's intention that section 441b—unlike the provisions that Congress narrowed in 1976—extends beyond expenditures for express advocacy.[8]

In sum, the language, structure, purposes, and legislative history of section 441b clearly establish that Congress designed that provision to regulate some corporate and union expenditures in connection with federal elections that do not involve express advocacy at all. The Court did not examine any of this evidence of congressional intent when it stated in dictum in *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 249, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." Instead, the Court rested its con-

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[8] For this reason, the court of appeals erred in relying (App. 7a) upon *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980), both of which construed statutory provisions that Congress did limit to expenditures for express advocacy.

clusion entirely upon a desire to avoid constitutional questions that might arise if the statute were construed more broadly. We show below that those constitutional concerns are not applicable to the regulation at issue in this case, but it is well settled in any event that "in avoiding constitutional questions, the Court may not embrace a construction that 'is plainly contrary to the intent of Congress,'" as we have shown this one to be. *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). *Accord, Rust v. Sullivan*, 59 U.S.L.W. at 4456.

This Court has not hesitated to re-examine its prior dicta once it is shown that the earlier pronouncement is erroneous. *See, e.g., Scarborough v. United States*, 431 U.S. 563, 575 n.11 (1977) ("[F]urther consideration has persuaded us that that was not the choice Congress made"); *Board of Trustees of State Univ. of New York v. Fox*, 109 S.Ct. 3028, 3033 (1989).[9]

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[9] The court of appeals erred in concluding (App. 6a-7a) that this statement was not dictum. In *Massachusetts Citizens for Life*, the Commission alleged that MCFL had violated section 441b by using its corporate funds to distribute a voter guide election newsletter. MCFL defended by arguing that the provision prohibited only expenditures for "express advocacy" and that MCFL's newsletter contained no express advocacy. This Court readily agreed that MCFL's newsletter "falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public." *Massachusetts Citizens for Life*, 479 U.S. at 249-50. The case before the Court did not require any consideration of whether expenditures not involving "express advocacy" would be covered by section 441b. Thus, the Court's

But dicta or not, this Court's statement in *Massachusetts Citizens for Life* should not be left to stand, without any examination of statutory intent, as a bar to the Commission's ability to implement the policies of a statute Congress has long considered of vital importance to the maintenance of the integrity of federal elections.

II. THE COMMISSION DOES NOT LACK STATUTORY AUTHORITY TO PROMULGATE NARROWLY TARGETED REGULATIONS DEFINING UNAMBIGUOUSLY ELECTION-RELATED EXPENDITURES THAT ARE COVERED BY 2 U.S.C. § 441b

This case is a challenge to the facial validity of the Commission's regulation, 11 C.F.R. § 114.4(b)(5)(i), the effect of which is to specify that 2 U.S.C. § 441b requires corporations and unions to finance the public distribution of partisan voter guides from separate segregated funds rather than from their organizational treasuries. No constitutional challenge has been raised in this case; instead, the courts below found the regulation invalid as unauthorized by the statute. In this sort of review, the regulation "may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 59 U.S.L.W. at 4454. *See also, Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973). This deferential test is fully applicable to the Commission's implementation of the Act, for "the Commission is precisely the type of agency to which def-

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statement, after a brief, two-paragraph discussion of its construction of a different provision of the Act ten years earlier in *Buckley*, was clearly dictum.

erence should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

There has never been any dispute that 11 C.F.R. § 114.4(b)(5)(i) satisfies this test. As noted *supra*, p. 12, both of the courts below explicitly agreed that the Commission's regulation is consistent with the broad language of section 441b, and we have shown *supra*, pp. 12-15, that the regulation implements congressional intent expressed in the legislative history. Neither respondents nor the courts below have suggested that there is anything in the language, structure, or legislative history of section 441b that conflicts with the Commission's regulation. Indeed, the Commission submitted this regulation to Congress for review pursuant to 2 U.S.C. § 438(d) before promulgating it, and "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (internal quotation marks omitted). *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. at 34-35.

Although the Commission's regulation thus satisfies the established test for facial validity, the courts below nevertheless found it in conflict with the statute on the basis of this Court's statement in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 249, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." We have shown above that this statement was erroneous and ought to be overruled. But even if section 441b must generally be limited for constitutional reasons to expenditures for "express advocacy," the Commis-

sion regulation at issue here is narrowly targeted at a specific type of expenditure that is unambiguously election related, and thus does not implicate the vagueness and overbreadth concerns that led the Court to adopt the "express advocacy" limitation.

This Court developed the "express advocacy" standard in *Buckley v. Valeo*, 424 U.S. 1 (1976), in construing two provisions of the Act not involved here. In order to eliminate vagueness and overbreadth in the terms used in those provisions and to ensure that they could not be applied broadly to discussion of issues as well as to "advocacy of a political result," *Buckley*, 424 U.S. at 79, the Court found it necessary to limit the provisions "to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* The Court therefore construed those provisions "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. This construction was designed to exclude from the provisions' coverage communications devoted to issues that are closely associated with particular politicians who are candidates, because discussion of such issues often includes reference to those candidates. *Id.* at 42.

The Commission regulation at issue comports with this approach by narrowly defining a particular type of expenditure that is unambiguously election related. The focus of a voter guide subject to 11 C.F.R. § 114.4(b)(5)(i) is upon a direct comparison of clearly identified candidates in specific upcoming elections. The sole purpose of such a voter guide is to assist voters in choosing which of the named candidates they will support at the polls, and issues are

presented in such a guide as a basis for choosing among the candidates, not to promote a position on the issues themselves. When such a voter guide is written to tell the reader which candidate's position is supported by the union or corporation, and which candidate's position is opposed, it is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

The court of appeals concluded that the regulation's limitatons on specifying, in such a voter guide, the position of the corporation or union on the issues used to compare candidates constitutes the sort of restriction on issue advocacy that the "express advocacy" test was designed to foreclose. However, the regulation is only applicable when the corporation or union presents its position on issues as the touchstone for choosing among competing federal candidates, and does so in the specific comparative format of a voter guide. The regulation is, therefore, properly directed at advocacy of candidates rather than of issues; it affects statements on issues only when they are used, in the form of a voter guide, as a signal as to which candidate the corporation or union supports or opposes. Thus, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 249, this Court found that a voter guide went "beyond issue discussion to express electoral advocacy" by using advocacy of the issues upon which the candidates were compared to signal the corporation's candidate preference. "The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id. See also United States v. Lewis Food Co.*, 366 F.2d 710, 712 (9th Cir. 1966) ("[T]he 'Notice to Voters' was

not intended to give an objective report on the voting record of public office holders . . . [but] makes it plain that, in [the corporation's] opinion, those office holders who are given low ratings on their votes . . . should not be reelected").

In sum, in the special context of a voter guide, the expression of support for the position of one of the identified competing candidates over the views of the other candidates is an unmistakable signal that the voter should choose the favored candidate at the polls. "[E]ven if it is not presented in the clearest, most explicit language, speech is 'express' . . . if its message is unmistakable and unambiguous, suggestive of only one plausible meaning." *FEC v. Furgatch*, 807 F.2d at 864. Because the voter guide format itself conveys the "unmistakable" message that the voter should use it as the basis for selecting candidates at the polls, the Commission's regulation does not contravene the purposes of the express advocacy test.

The regulation in this case does not appreciably infringe the ability of a corporation or union to advocate its position on issues. First, corporations and unions can use their treasury funds to finance communications on any subject, including electoral advocacy, to their executives, stockholders, and members and those individuals' families. 2 U.S.C. § 441b(b)(2)(A). Second, any corporation or union can lawfully distribute to the general public a partisan voter guide that expresses support for or opposition to a particular candidate as long as the corporation's separate segregated fund pays the costs of the guide. Third, and most important, the regulation has no application at all to the use of corporate and union treasury funds to advocate positions on issues as long

as such advocacy is not presented as the touchstone for choosing candidates in a voter guide.

Difficult questions may be presented when a corporation or union makes an expenditure for a communication that includes issue advocacy and also discusses candidates for federal office, and constitutional concerns require care in such circumstances in distinguishing election-related matters subject to section 441b from issue advocacy that is not. But the regulation in this case does not pose that difficulty, for it is not applicable at all unless the corporation or union chooses to frame its communication as a voter guide that explicitly compares the competing candidates in an upcoming election. The regulation serves an important purpose in implementing the protection of the electoral process Congress enacted in 2 U.S.C. § 441b, and any corporation or union wishing to engage in issue advocacy can do so without implicating this regulation simply by avoiding the comparative voter guide format. *Cf. NLRB v. Gissel Packing Company*, 395 U.S. 575, 620 (1969).

The court of appeals held that the Commission has no authority to promulgate such specific rules implementing congressional intent in this area, even if they do not contravene the concerns underlying the "express advocacy" test. The Commission's authority to implement section 441b is an issue of great importance to the administration of the campaign financing statutes that this Court has found to serve vital national interests, and clearly warrants review by this Court.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 19, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1832

SANDRA FAUCHER AND MAINE RIGHT TO LIFE COMMITTEE, INC., PLAINTIFFS, APPELLEES,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT, APPELLANT.

Appeal from the United States District Court
for the District of Maine
[Hon. D. Brock Hornby, *U.S. District Judge*]

March 21, 1991

Before

Torruella and Selya, *Circuit Judges*,
and Pollak,* *Senior District Judge.*

Richard B. Bader, Associate General Counsel, with whom *Lawrence M. Noble*, General Counsel, and *Vivien Clair*, Attorney, were on the brief for appellant.

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* Of the Eastern District of Pennsylvania, sitting by designation.

James Bopp, Jr., with whom *Richard E. Coleson*, *Brames, McCormick, Bopp & Abel*, *Bryan M. Dench* and *Skelton, Taintor & Abbott*, were on brief for appellees.

TORRUELLA, *Circuit Judge*. Pursuant to a suit filed by the Maine Right to Life Committee, Inc. ("MRLC") and Sandra Faucher, a member of MRLC's Board of Directors, seeking declaratory judgment and injunctive relief, the United States District Court for the District of Maine (Hornby, J.) adjudged a Federal Election Commission ("FEC") regulation, 11 C.F.R. § 114(b)(5)(i), invalid as unauthorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* [hereinafter FECA]. We find no reason to disturb that ruling on appeal.

FACTS

MRLC is a nonprofit membership corporation organized for the purpose of promoting pro-life issues. MRLC is not affiliated with any political party or campaign committee and does not engage in any business activities other than fundraising. There are approximately 1,800 members associated with the corporation.

MRLC publishes a bi-monthly newsletter, containing educational articles and news of local chapter activities, which is mailed directly to all dues-paying members and is also made available to the general public through schools, churches, etc. Before elections, MRLC conducts candidate surveys to ascertain federal and state candidates' positions on pro-life issues. The survey responses are published in the newsletter. Publication costs for the newsletter are drawn from the corporation's general and educational

funds rather than the separate segregated funds of its political action committee.

In 1985, Faucher and MRLC first filed suit against the FEC and the United States Attorney General challenging the validity of FEC regulations governing the publication of voter guides by corporations found at 11 C.F.R. § 114.4(b)(5)(i). That suit was stayed pending the outcome before the Supreme Court of *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986). Thereafter, on February 24, 1989, the suit was dismissed on the ground that the plaintiffs first needed to obtain an FEC advisory opinion as to the legality of any proposed publication. An advisory opinion was sought in May 1989. MRLC submitted a 1988 voter guide to the FEC, which was substantially similar to the guide proposed for 1990. The 1988 guide was entitled "November Election Issue 1988!," was subheaded "Federal & State Candiate Surveys Enclosed—Take-along Issue for Election Day!" featured candidate and party positions on pro-life issues, and contained the following statement: "PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question." The guide did, however, also carry a disclaimer which read: "The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC."

On February 14, 1990, the FEC issued its advisory opinion, finding the plaintiff's publication unacceptable because it favored a pro-life position and therefore did not qualify as "nonpartisan" under the regulation. As a result, the plaintiffs filed the current lawsuit on April 12, 1990, seeking declaratory judgment (a) that the disputed regulation went beyond

the statutory authority and was unconstitutionally vague and (b) that MRLC's proposed 1990 voter guide violated neither the FECA nor the FEC voter guide regulations. An application for preliminary injunction was filed on May 23, 1990. The FEC and Attorney General filed motions to dismiss on June 1, 1990. Following a hearing on June 4, 1990, the application for preliminary injunction was consolidated with the action on its merits.

The district court decided only the issue of whether the regulation in question fell within the statutory authority of the FECA, finding that the plaintiffs lacked standing to challenge the regulation on any of the several other asserted grounds. The district court also found that injunctive relief was inappropriate as that issue was not yet ripe for review. After a careful examination of controlling law, the district court concluded that "the regulation, as promulgated with its focus on issue advocacy, is contrary to the statute [28 U.S.C. § 441b] as the . . . Supreme Court has interpreted it, and therefore, beyond the power of the FEC."

DISCUSSION

Section 441b(a) of the FECA prohibits corporations from using general treasury funds to make "contribution[s] or expenditure[s] in connection with any [federal] election." [1] The FEC, entrusted with regulatory power under the FECA, has interpreted this provision very broadly to include a ban on cor-

[1] Section 441b(b)(2)(C) allows corporations to establish separate segregated funds for this purpose; however, the action taken by MRLC involved general corporate funds. This section is, therefore, irrelevant to a determination of the instant case.

porate financed activities involving express advocacy, discussed *infra* p. 6, as well as issue advocacy. The regulation in question, 11 C.F.R. § 114.4(b)(5), states:

> (5) *Voter guides.* (i) A corporation . . . may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to these questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:
>
> * * * *
>
> (C) The wording of the questions presented does not suggest or favor any position on the *issues* covered;
>
> (D) The voter guide expresses no editorial opinion concerning the *issues* presented nor does it indicate any support for or opposition to any candidate or political party.

(Emphasis added).

A.

First, we face the question of whether the FEC has the authority, under section 441b(a), to restrict issue advocacy or whether the FEC may only restrict express advocacy. Since determining whether a regulation is "reasonably related" to the purposes of the underlying statute is a question of law, this court reviews the district court's decision de novo. *See, e.g., Massachusetts* v. *Secretary of Health and Human Services*, 816 F.2d 796, 801 (1st Cir. 1987), *rev'd in part on other grounds sub nom., Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

We begin by defining the scope of the statute. On its face, the statute appears to allow for a very broad application. Our inquiry, however, does not end there.

The Supreme Court, recognizing that such broad language as found in section 441b(a) creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy." *Buckley* v. *Valeo*, 424 U.S. 1, 42-43 (1976); *see also United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369, *reh'g denied*, 403 U.S. 924, *reh'g denied sub nom.*, *United States* v. *Reidel*, 403 U.S. 924 (1971) ("When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). Express advocacy is language which "in express terms advocate[s] the election or defeat of a clearly identified candidate" through the use of such phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Buckley*, 424 U.S. at 44 and n.52. This express advocacy test was again embraced by the Supreme Court in the more recent case of *Massachusetts Citizens for Life*. *See Massachusetts Citizens for Life*, 479 U.S. at 249. The FEC, however, maintains that the language relied upon in *Massachusetts Citizens for Life* was mere dictum and therefore not binding on this court. We do not agree. All nine Justices assented to that portion of the opinion which states: "We therefore *hold* that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249 (emphasis added). We cannot accept that in resolving

constitutional issues such as the one presented in *Massachusetts Citizens for Life*, the Supreme Court proclaims the law lightly. The Court's "basis for deciding [should] not [later be treated as] dictum [simply] because a critic would have decided on another basis." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 385-86 (1964).

In further support of this position, we note that the second and the ninth circuits have both likewise recognized the express advocacy test. *See Federal Election Commission* v. *Central Long Island Tax Reform*, 616 F.2d 45, 53 (2d Cir. 1980) (section 441d "clearly establish[es] that, contrary to the position of the FEC, the words 'expressly advocating,' mean exactly what they say"); *Federal Election Commission* v. *Furgatch*, 807 F.2d 857, 860 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) ("We must apply [the FECA] consistently with the constitutional requirements set out in *Buckley*").

We turn next to the issue of whether 11 C.F.R. § 114.4(b)(5) falls within the scope of section 441b (a). Ordinarily, when a statute is silent or ambiguous, "considerable weight should be accorded to an executive department's construction of a statutory scheme it [has been] entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1983), *reh'g denied sub nom., American Iron and Steel Institute* v. *Natural Resources Defense Council, Inc.*, 486 U.S. 1227 (1984). That rule of construction no longer applies, however, once the Supreme Court has spoken on the issue. The Supreme Court is the final authority with respect to statutory construction; therefore, an interpretation

given a statute by the Supreme Court becomes the law and must be given effect. *Id.* at 843 n.9. It is not the role of the FEC to second-guess the wisdom of the Supreme Court.

In limiting section 441b(a) to express advocacy, the Court in *Buckley* clearly had the protection of issue advocacy in mind. *Buckley* reads: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley*, 424 U.S. at 14-15. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. The FEC nevertheless has sought to restain that very same activity which the Court in *Buckley* sought to protect. This we cannot allow.

B.

In the alternative, the FEC argues that even if section 441b(a) is restricted to express advocacy, the speech sought to be regulated in this case was express advocacy and therefore falls within the scope of the FECA. To the extent that this argument asks us to treat the regulation, despite its multiple references to "issue advocacy," as reaching only "express advocacy," the Supreme Court has barred such word games. *See, e.g., Buckley*, 424 U.S. at 42-44 (expressing concern that the "distinction between discussion of issues and candidates may often dissolve in practical application" and adopting a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation); *see also Massachusetts Citizens for Life*, 479 U.S. at 249. In *Buckley*, the Court quoted *Thomas* v. *Collins*, 323 U.S. 516 (1945), approvingly,

on the difficulty of interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43 (quoting *Collins*, 323 U.S. at 535). In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.

To the extent that the argument asks that we strike only the impermissible parts of the regulation, we cannot oblige, because we find it necessary to invalidate 11 C.F.R. § 114.4(b)(5)(a) as a whole. We take such action because the regulation's definition of "nonpartisan" inextricably binds its prohibition of issue advocacy with its prohibition of express advocacy. We are therefore unable to sever the offending

portion of the regulation from that portion dealing with express advocacy which might otherwise be valid. *Cf. Hodgson* v. *Minnesota*, —— U.S. ——, 110 S. Ct. 2926, 2934 (1990) (when an invalid portion of a statute (or regulation) cannot be severed from the whole, the entire statute must fall).

CONCLUSION

The first amendment lies at the heart of our most cherished and protected freedoms. Among those freedoms is the right to engage in issue-oriented political speech. The highest court of this land has expressly recognized that as a nation we have a "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). *Buckley* and *Massachusetts Citizens for Life* ensured that right for corporations as well as individuals by limiting the scope of the FECA to express advocacy. We therefore uphold the district court in striking down 11 C.F.R. § 114.4(b)(5)(1) for having overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1832

SANDRA FAUCHER and
MAINE RIGHT TO LIFE COMMITTEE, INC.,
PLAINTIFFS, APPELLEES,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT, APPELLANT.

JUDGMENT

Entered March 21, 1991

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

(cc: Messrs. Bader, Bopp, Jr.)

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No.: 90-0112-B

SANDRA FAUCHER and MAINE
RIGHT TO LIFE COMMITTEE, INC.,
PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION
and RICHARD THORNBURGH, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HORNBY, District Judge

BACKGROUND

In 1985, Faucher and the Maine Right to Life Committee (MRLC) sued the Federal Election Commission (FEC) and the United States Attorney General in this Court, challenging FEC regulations governing the publication of voter guides by corporations. That suit was stayed pending the outcome of a United States Supreme Court decision ultimately handed down in 1986. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). On February 24, 1989, the lawsuit was dismissed on the ground that the plaintiffs needed first to obtain an FEC advisory opinion on the legality of any proposed publication.

708 F. Supp. 9 (D. Me. 1989). The plaintiffs sought such an advisory opinion on May 15, 1989. The FEC requested additional information, which the plaintiffs provided on October 24, 1989. The FEC then issued its advisory opinion February 14, 1990, finding the plaintiffs' proposed publication illegal because (a) MRLC has a policy of accepting contributions from corporations and has, in fact, accepted such contributions, thus distinguishing its circumstances from the publication permitted by the Supreme Court in *FEC v. Massachusetts Citizens for Life*; and (b) MRLC's proposed publication does not meet the factors contained in the Commission's regulations permitting nonpartisan voter guides, inasmuch as the proposed publication suggests that the MRLC does favor a position, specifically a pro-life position.

The plaintiffs filed the current lawsuit against the same defendants on April 12, 1990. They filed an application for preliminary injunction on May 23, 1990. A telephone scheduling conference was held with counsel on May 25, 1990. The FEC and Attorney General filed their motions to dismiss on June 1, 1990. A hearing on the application for preliminary injunction was held on June 4, 1990. At that time all parties agreed to stipulate to the record before the Court, and the trial of the action on the merits was advanced and consolidated with the hearing on the application for preliminary injunction. *See* Fed. R. Civ. P. 65(a)(2).

FACTS

Maine Right to Life Committee, Inc., is a nonprofit membership corporation exempt from federal income tax under Internal Revenue Code § 501(c)(4). MRLC has approximately 1,800 members. Sandra Faucher is a member of the Board of Directors.

MRLC is not affiliated with any political party or campaign committee, but is an ideological organization whose purpose is to promote the sanctity of human life, both born and unborn, and educate the public on pro-life issues. MRLC does not engage in business activities other than the raising of funds to carry out the corporation's expressed purposes. It has established a separate segregated fund designated as the Maine Right to Life Committee Political Action Committee (PAC).

Over the years, MRLC has received non-PAC contributions from corporations or businesses as follows:

	Government/Business Contributions	Total non-PAC Contributions
1984	$365	$31,879.71
1985	87	48,614.68
1986	175	69,286.78
1987	393	74,321.31
1988	285	66,607.46
1989	470	70,999.25

MRLC has no written policy regarding the acceptance of corporate or business contributions. MRLC publishes a bi-monthly newsletter using its general and education funds, but not its PAC funds.

The newsletter. containing educational articles and news of local chapter activities, is mailed to all dues-paying members of MRLC and handed out to members of the public in schools, churches and elsewhere. Before an election, MRLC conducts a candidate survey to ascertain federal and state candidates' positions on pro-life issues. The survey responess are published in the newsletter. The November 1988 issue of the newsletter was entitled "November Election Issue 1988!" The subheading was "Federal &

State Candidate Surveys Enclosed—Take-along Issue for Election Day!" The front page featured pictures of George Bush and Michael Dukakis with copy concerning the positions of the presidential and vice-presidential candidates and the respective party platforms on pro-life issues. The second, third and fourth pages featured the questionnaire and the candidates' responses. The newsletter stated:

> *Please recheck your candidate's survey*, even if you already received our primary survey issue. The fall polling pulled in some new respondents, and those who did not respond at all need to be contacted by pro-life constituents so that their positions can be determined. *It is vital that your local candidate hear from you on this issue.* Please look this survey over carefully, contact your local candidates, and call the MRLC office to report your results!

(emphasis original). The newsletter also stated, "The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC."

MRLC plans to publish newsletter issues for the 1990 Maine election and primary "substantially similar" to the November 1988 voter guide.[1]

RELIEF REQUESTED

The plaintiffs seek a declaratory judgment that the FEC's voter guide regulations are beyond the authority of the FEC and unconstitutionally vague; a declaratory judgment that the MRLC's proposed 1990

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[1] I am aware that the primary election has taken place. No 1990 version of the publication, however, has been provided to the Court.

publications are permissible under the Federal Election Campaign Act of 1971 as interpreted by the United States Supreme Court; and an injunction against the defendants to prevent them from enforcing the regulations against the plaintiffs' 1990 publications. The plaintiffs also seek attorneys' fees and costs.

The defendants have moved to dismiss the action for lack of jurisdiction, failure to state a claim upon which relief can be granted and the inappropriateness of equitable relief.

DECLARATORY JUDGMENT CHALLENGE TO THE FEC REGULATIONS

A federal court has authority to review a challenge to the legality of federal agency regulations under the Administrative Procedure Act (APA) under certain circumstances. Specifically, final agency action for which there is no other adequate remedy in a court is subject to judicial review. 5 U.S.C. § 704. Parties who are "adversely affected or aggrieved by agency action" may seek that review. 5 U.S.C. § 702. Here, the FEC's promulgation of regulations is final agency action. *Cf. Sherwin v. Secretary of Health & Human Services*, 685 F.2d 1, 4-5 (1st Cir. 1982). The plaintiffs are aggrieved persons because MRLC is a nonprofit corporation that has published and seeks to continue publishing voter guides that take a position on issues such as abortion, and the FEC has promulgated specific regulations that directly affect what the plaintiffs [2] may say in their voter guides. Specifically, the regulations restrict organizations

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[2] The parties have not distinguished between the two plaintiffs on standing or any other grounds.

such as MRLC from taking a position on the issue in their voter guides. Compliance with those regulations, which the plaintiffs assert to be illegal, thus directly affects their activities. The United States Supreme Court has declared that judicial review is presumed to be available under the APA "absent some clear and convincing evidence of legislative intent to preclude review." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1986). I find no such clear and convincing evidence in the FEC statute, either explicit or implicit in the statutory structure. It is true that the statute provides for conciliation when the FEC determines that a violation has occurred, 2 U.S.C. § 437g, and that it provides an unusual form of judicial review when the statute itself is challenged as unconstitutional, 2 U.S.C. § 437h (immediate certification to the Circuit Court of Appeals sitting *en banc*). The statute also specifically provides for judicial review when a complainant is dissatisfied with an FEC decision that no illegality has occurred. 2 U.S.C. § 437g(a)(8)(A). Although these factors, with others, lead me later to conclude that this controversy is not appropriate for declaratory and injunctive relief with respect to the proposed 1990 publications, there is not enough in this statutory structure to persuade me that Congress intended to preclude ordinary APA judicial review of the validity of the regulations. Accordingly, I have authority under 5 U.S.C. § 706(2)(C), to determine whether those regulations exceed the FEC's authority. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-148 (1967).[3]

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[3] The plaintiffs are not seeking judicial review of an advisory opinion. The reasoning of *United States Defense Committee v. FEC*, 861 F.2d 765 (2d Cir. 1988) is therefore inapplicable.

The statutory basis for the regulations in question is 2 U.S.C. section 441b(a). It prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any election a which . . . a Senator or Representative . . . [is] to be voted for, or in connection with any primary election . . . held to select candidates for any of the foregoing offices . . . ." On its face, this language directly prohibits a corporation like MRLC from making any expenditures to publish its voter guides in connection with the 1990 elections.[4] I am satisfied, however, that under *Buckley v. Valeo*, 424 U.S. 1 (1976), as construed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court on constitutional grounds has explicitly limited the scope of this prohibition to "express advocacy" of the election or defeat of a clearly identified particular candidate or candidates. I do not accept the FEC's argument that this narrowing of the statutory prohibition to "express advocacy" is not binding on this Court. The Supreme Court specifically said: "We therefore *hold* that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249 (emphasis supplied); *accord*, *FEC v. NOW*, 713 F. Supp. 428, 433-34 (D.D.C. 1989). Nothing could be clearer.

It is undisputed that the FEC has not amended its regulation on this subject to reflect the Supreme Court's statements in *FEC v. Massachusetts Citizens*

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[4] 2 U.S.C. § 441(b)(d)(2)(C) does permit a corporation to establish a separate segregated fund for political purposes and MRLC has done so, establishing its own PAC. But the controversy before the Court involves use of MRLC's corporate funds apart from its PAC funds.

for Life. The pertinent regulation is contained in 11 C.F.R. § 114.4(b)(5)[5]. That regulation permits a

[5] (5) *Voter guides.* (i) A corporation or labor organization may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:

(A) The questions are directed to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the questions may be directed only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) The voter guide reprints verbatim the responses of each candidate to whom questions were sent, without any additional comment, editing, or emphasis, although the sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments;

(C) The wording of the questions presented does not suggest or favor any position on the issues covered;

(D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party;

(E) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission;

(F) The voter guide is made available to the general public in the geographic area in which the sponsoring organization normally operates.

(ii) A corporation or labor organization may distribute voter guides or other types of brochures describ-

corporation to publish voter guides in certain circumstances. Under the regulation, the critical element for the FEC is whether a voter guide is "nonpartisan." In making that determination, the Commission considers such factors as whether the wording "suggest[s] or favor[s] any position on the *issues* covered" and whether it expresses any "editorial opinion concerning the *issues* presented," 11 C.F.R. § 114.4 (b)(5)(i)(C), (D) (emphasis supplied). This approach ignores the clear language of *FEC v. Massachusetts Citizens for Life* that issue advocacy by a corporation *cannot* constitutionally be prohibited and that only express advocacy covering the election or defeat of an identifiable candidate or candidates is constitutionally within the statute's prohibition.

I conclude, therefore, that the regulation, as currently promulgated with its focus on issue advocacy, is contrary to the statute as the United States Supreme Court has interpreted it and, therefore, beyond the power of the FEC.

I do not reach the question whether the regulation is also invalid for assertedly failing to apply *FEC v. Massachusetts Citizens for Life*'s holding that the statute cannot constitutionally limit even express advocacy by certain categories of nonprofit membership corporations. In *FEC v. Masachusetts Citizens for Life*, the Supreme Court made clear that one of the

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ing the candidates or their positions which are obtained from a nonprofit organization which is exempt from Federal taxation under 26 U.S.C. 501(c)(3) or (4) and which does not support, endorse or oppose candidates or political parties. Publications obtained from such nonprofit organizations need not comply with the guidelines set forth at 11 CFR 114.4(b)(5)(i), but they may not favor one candidate or political party over another.

"essential" factors for its holding was that the non-profit corporation there did not receive, *and had a policy of not receiving*, any corporate funds. 479 U.S. at 263. Where a nonprofit corporation did receive corporate funding, as in *Austin v. Michigan Chamber of Commerce*, —— U.S. ——, 108 L.Ed.2d 652 (1990), the Court declared that it was not exempt from the prohibition because "[b]usiness corporations therefore could circumvent the Act's restrictions by funneling money through the Chamber's general treasury." 108 L.Ed.2d at 667. Here, although the amounts received by MRLC from corporations have been comparatively modest, they are obviously not subject to any control. Without an explicit policy against contributions from corporations, the risk remains that an organization like MRLC could "serv[e] as [a conduit] for the type of direct spending that creates a threat to the political marketplace." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 264. It is this potential for influence that supports the restriction on corporate funding. *Id.* at 263. Since MRLC clearly does not fit within the category of non-profit corporations to which the Supreme Court spoke in *Massachusetts Citizens for Life*, I conclude that the plaintiffs do not have standing to challenge the FEC regulation on this score.

I also do not address the plaintiffs' challenge to the FEC's asserted failure to provide a regulatory exemption reflecting the statutory exemption of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newsaper, magazine, or other periodical publication . . . ." 2 U.S.C. § 431(9)(B)(i). I am satisfied that the MRLC does not fit within this media exemption.

See Austin v. Michigan Chamber of Commerce, 108 L.Ed.2d at 669-70 (construing similar language in a state statute to apply to "media corporations"). The plaintiffs therefore do not have standing to challenge the FEC's asserted failure in this regard.

Finally, I do not address the plaintiffs' challenge to 11 C.F.R. § 114.4(b)(5)(ii)—the assertion that the regulation is unconstitutionally vague in directing that certain publications "not favor one candidate or political party over another." That portion of the regulation affects the voter guides only of non-profit, tax-exempt corporations that do not "support, endorse or oppose candidates or political parties." [6] Since MRLC has estbalished a PAC that does support, endorse or oppose candidates, that portion of the regulation does not apply to it. Therefore, the plaintiffs do not have standing to challenge the asserted vagueness of that portion of the regulation.

REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AS IT APPLIES TO THE PROPOSED 1990 PUBLICATIONS

The plaintiffs have done what the first *Faucher* decision instructed them to do: they have obtained an FEC advisory opinion. That advisory opinion demonstrates that the FEC considers their 1988 voter guide or any substantially similar publication to be illegal under its regulations. I nevertheless conclude that their request for declaratory and injunctive relief to prevent any FEC or Attorney General enforce-

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[6] The Commission has previously held that a tax-exempt corporation becomes an organization that supports, endorses or opposes candidates if it establishes a separate, segregated PAC fund that does so. Advisory Opinion 1984-17.

ment action against their proposed 1990 publications is still not ripe for determination by this Court.

From the record before me, I know only that the new publications will be "substantially similar" to the 1988 publication. In determining what is "express advocacy" and what is not, however, language and format are critical. *Buckley v. Valeo* focused on explicit wording such as "vote for" and "elect."[7] I am not prepared to base declaratory and injunctive relief upon a 1988 publication, when minor changes could make that ruling wholly inapplicable to the actual 1990 publications.[8] At the very least, it would

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[7] In *Buckley v. Valeo*, the Court described this category of express advocacy as involving explicit language such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." 424 U.S. 1, 44 n.52 (1976).

[8] In the 1988 version there is a disclaimer stating that "the publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC." In addition, there is nowhere any express urging to vote for a particular candidate or party. On the other hand, the context suggests that the issue is intended to influence people's voting behavior. It is entitled "Election Issue" and is described as a "Take-along Issue for Election Day!" The viewpoints of the candidates are elaborated with specific reference to the position of the Maine Right to Life Committee and National Right to Life Committee and the publication makes clear which candidates support the views of these organizations. Slight changes in wording and format could easily affect a conclusion as to whether this is express advocacy. It seems logical, moreover, that more than slight changes in format will be necessary. The 1988 issue devoted its front page to the presidential campaign, and there is obviously no such campaign this year. Furthermore, the candidates are different from the candidates in the 1988 issue. It is difficult, therefore, to know what exactly is meant when it is said that the proposed publications are "substantially similar" to the 1988 publication.

probably bring the parties back to court to argue whether the new publications were "substantially similar."

Equally important, the new voter guide, because of its ultimate wording and format, may not raise the FEC's ire and a decision may therefore never be needed on whether FEC enforcement against the publication is permissible.

The Attorney General has an enforcement role only if there is a knowing and willful violation that involves over $2,000. 2 U.S.C. § 437g(d)(1)(A). The plaintiffs' affidavit in their previous lawsuit said that the per issue cost of a newsletter was $628 ($350 for printing, $278 for postage). The affidavit also indicates that there are no plans to increase the circulation. There is thus no suggestion that the cost of two election issues will exceed $2,000.[9]

Finally, although I have concluded that the Court has the authority to review the validity of the FEC regulations under the APA, the statutory role of the FEC in enforcement activities gives me some pause in issuing declaratory and injunctive relief concerning particular publications. Conciliation between the FEC and any alleged law violator is a primary element of the enforcement provisions. *See* 2 U.S.C. § 437g. In the case of these proposed newsletters, there may never be any complaints by anyone (apparently no one has complained about previous MRLC newsletters); the Commission may find no

[9] Moreover, the plaintiffs have not contradicted the assertion that the Justice Department policy (summarized in the FEC's brief at p. 21, n.13) is only to prosecute criminally if large sums are involved and clandestine means are used to disguise their use.

violation in the ultimate wording of the newsletter; the Commission may decide that any violation is only *de minimis* and not worthy of pursuit; conciliation may lead to voluntary minor changes in wording that satisfy the Commission; or MRLC may find acceptable some other outcome—for example, a minor penalty such as refunding the amount of its corporate contributions. Only if none of these occur would an FEC enforcement action be necessary. Injunctive and declaratory relief now would unnecessarily restrain the FEC's discretion and would provoke hard and fast judicial line-drawing in a context where the statutory enforcement apparatus clearly favors conciliation and avoidance of litigation over specific election issues.

I am not persuaded that the plaintiffs' First Amendment arguments justify the relief they seek for 1990 publications in the face of the concerns I have enumerated. They contend that they are chilled in their freedom of speech and expression if they must publish in the context of possible enforcement proceedings. Nevertheless, they have been publishing the newsletter and voter guides in previous years despite the possibility of enforcement. As I have already stated, there is no threat, or even any suggestion, of criminal prosecution. The civil litigation threat is minimal. The penalty would be limtied to a maximum of $10,000 under 2 U.S.C. section 437g(a)(6) (because the cost of the publication is far less than that). The penalty, to be set by a United States District Court, could be far less. The cost of defending such civil litigation cannot be considered a major deterrent. It is probably no more expensive than the proceedings that the plaintiffs have voluntarily undertaken in trying to secure their injunction. Finally,

the likelihood of civil litigation is minimal given the conciliation requirements of the statute and the FEC's failure to take any action with respect to previous publications.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) identified two factors for a federal court to consider in determining whether a controversy is ripe for resolution: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." The facts provided by the parties in this case simply do not make the issue of declaratory and injunctive relief fit for judicial decision. In a context were words and nuances may be critical, I do not have the actual language and format of the publications. Given the FEC's enforcement role, which I have outlined, such relief would unduly interfere with the overall ability of that agency to conduct investigations of alleged violations, might well delay it in gathering important information and would interfere with the congressional goal of resolving specific election disputes through conciliation. The scope of any declaratory relief or injunction would probably be confusing, given the likelihood that there will be changes in the new publications. An injunction may in fact be wholly unnecessary. Finally, any hardship to the parties in finding this issue not ripe is minimal, given the plaintiffs' historical practice of publishing despite any uncertainty.

Accordingly, the plaintiffs' request for declaratory and injunctive relief with respect to 1990 publications is *DENIED*; and the plaintiffs request for declaratory judgment is *GRANTED* as follows:

IT IS HEREBY ADJUDGED that the regulation found in 11 C.F.R. § 114.4(b)(5)(i) is invalid as not

authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are "nonpartisan" in a broad sense that includes issue advocacy rather than the narrower test of "express advocacy."

The Clerk shall enter judgment accordingly.

Dated at Bangor, Maine this 29th day of June, 1990.

/s/ D. Brock Hornby
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No.: 90-0112-B

SANDRA FAUCHER and MAINE
RIGHT TO LIFE COMMITTEE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION and
RICHARD THORNBURGH, DEFENDANTS

DECLARATORY JUDGMENT

This action came on for hearing before the Court and the Court having made its findings of facts and conclusions of law,

IT IS HEREBY ADJUDGED that the regulation found in 11 C.F.R. § 114.4(b)(5)(i) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), to the extent that the regulation makes the permissibility of voter guides published by corporations hinge upon whether such guides are "nonpartisan" in a broad sense that includes issue advocacy rather than the narrower test of "express advocacy."

Dated at Bangor, Maine this 2nd day of July, 1990.

/s/ D. Brock Hornby
United States District Judge

APPENDIX C

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of

any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advantage, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for po-

litical purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.
(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicition, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

APPENDIX D

11 CFR Ch. 1 (1-1-90 Edition)

Federal Election Commission

§ 114.4

* * * *

(b) *Nonpartisan communications by corporations and labor organizations to the general public*—(1) *General.* A corporation or labor organization may make the communications described in 11 CFR 114.4 (b)(2) through (5) to the general public. The corporation or labor organization may include its logo or otherwise identify itself as the sponsor of the communication.

* * * *

(5) *Voter guides.* (i) A corporation or labor organization may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:

(A) The questions are directed to all of the candidates for a particular seat or office, giving the candidates equal time to respond, except that in the case of Presidential and Vice Presidential candidates the questions may be directed only to those candidates seeking the nomination of a major party or to those appearing on the general election ballot in enough States to win a majority of the electoral votes;

(B) The voter guide reprints verbatim the responses of each candidate to whom questions were

sent, without any additional comment, editing, or emphasis, although the sponsoring organization may impose limitations on the number of words per response when the questions are initially sent to the candidates for their comments;

(C) The wording of the questions presented does not suggest or favor any position on the issues covered;

(D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party;

(E) The sponsor may ask each candidate to provide biographical information such as education, employment positions, offices held, and community involvement and may impose a limitation on the number of words per submission;

(F) The voter guide is made available to the general public in the geographic area in which the sponsoring organization normally operates.

APPENDIX E

[Emblem]

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

February 14, 1990

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-28

James Bopp, Jr.
Brames, McCormick, Bopp & Abel
The Tudor House
191 Harding Avenue
P.O. Box 410
Terre Haute, Indiana 47808-0410

Dear Mr. Bopp:

This responds to your two letters dated October 24 and May 15, 1989, which request an advisory opinion on behalf of the Maine Right to Life Committee, Inc. ("MRLC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the financing of MRLC newsletters that contain candidate surveys.

Your letters, and the documents submitted with them, indicate that MRLC has previously published several newsletters for public distribution that present the views of Federal candidates, including their responses to MRLC surveys, on policy issues such as abortion. MRLC proposes to issue similar newsletters in the future; in particular, in May 1990 before the June 12 primary election in Maine. Your May 15 letter sets forth several "issues" on which you request an advisory opinion from the Commission.

These questions, in essence, present the more basic issue as to whether MRLC may use its general corporate treasury funds to finance the pre-election newsletters.

The factual basis of the request is presented in your letters and in other materials submitted by you. You explain that MRLC is a statewide, nonprofit, section 501(c)(4) membership organization incorporated in 1974 in the State of Maine. It was formed "to promote the sanctity of all human life, including unborn children, and to educate the public on issues relating to abortion, infanticide, and euthanasia." MRLC itself is "not associated with any political candidate, campaign committee, or political party," but in 1981 it established a separate segregated fund, the Maine State Right to Life Political Action Committee (MRLCPAC). This political committee makes contributions to candidates for federal and State elective offices who "take a prolife stand on the issues of abortion, infanticide, and euthanasia."

MRLC prepares and distributes a bimonthly newsletter, *Life for ME*, "containing educational articles and news of local chapter activities." Prior to elections, the newsletter includes the results of a survey of candidates for Federal and State office. The survey is taken by means of an MRLC questionnaire, and candidate responses to the survey indicate their positions on "prolife issues." Your May 15 letter states that funding for the newsletter comes from the general treasury of MRLC, and not from the treasury of MRLCPAC. MRLC's treasury includes corporate contributions.

Your request indicates that MRLC solicits donations from business entities and corporations, and it allows them to become "members." Donations are also regularly received by MRLC from businesses and

corporations.[1] In addition, during 1989, MRLC began soliciting business advertising from "pro-life businesses" to defray the costs of printing and mailing *Life for ME*.[2] These solicitations have been mailed to businesses who "have been . . . supporter[s] of MRLC in the past. . . ." MRLC has also invited inquiries from business entities that would be interested in larger ads.

With respect to the newsletter issues which carry candidate survey responses and other candidate viewpoints on MRLC policy positions, your request included copies of MRLC newsletters from May 1984 and November 1988. These issues include candidate responses to numerous MRLC questions concerning possible amendments to the U.S. Constitution such as the "Human Life Amendment," overturning the Supreme Court decision in *Roe* v. *Wade*, and an "abortion-neutralization" amendment to the Equal Rights Amendment. In addition, the surveys sought Federal candidates' responses that would indicate their support or opposition to federal legislation such as "human life bills," as well as "pro-life amendments" to appropriation bills prohibiting federal funding for abortions and the funding of organizations which make referrals for abortions. The 1988 candidate survey also presented other legislative pro-

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[1] MRLC records do not differentiate between corporate donations and those from other business entities. In 1985 and 1986, MRLC received respectively $87 and $175 from corporations or other businesses. These donations represented less than .5% of its total donations in 1985 and approximately 1% in 1986. In 1984, business donations to MRLC represented slightly over 5% of total donations.

[2] The cost for an ad of business card size is $25 per issue, or $100 to run the same ad for a year.

posals such as barring the denial of "beneficial medical treatment" for newborn infants and for handicapped, chronically ill, and elderly persons. Each of these questions was posed in a manner whereby a "yes" reply by the candidate would be readily recognized as the "pro-life response" favored by MRLC.

The 1984 survey questions and results were published in the May/June 1984 issue of the MRLC newsletter and included the names of seven Federal candidates. Each of them was recorded as making no response to the survey. The 1988 survey questions, along with the results, were published in the November 1988 newsletter and identified six Federal candidates. Four of them were recorded as making no response to the survey. One gave "yes" answers to all ten questions, and the sixth candidate gave "no" answers to two questions but did not respond to the others. An introduction to the published survey responses in both 1984 and 1988 briefly notes the forthcoming elections and states that the survey report "does not represent an endorsement" of any candidate by MRLC. The reader was advised to contact candidates who had not responded at all; the 1988 issue emphasized that it "is vital that your local candidate hear from you on this issue."

In addition to the survey results for Congressional candidates, the November 1988 newsletter includes a front page feature, with headlines and photos, covering the two major party presidential candidates in the 1988 general election and their vice-presidential running mates. The top headline in bold, large type states: **NOVEMBER ELECTION ISSUE 1988!** A lower headline in smaller bold type says: **Take-along Issue For Election Day!**

This front page feature has separate photos of George Bush and Michael Dukakis who are also identified by political party affiliation. In contrast to the Congressional candidates identified in the reported survey results, the presidential candidates did not receive an MRLC survey. Their views on abortion issues are reported with references to their past official records and publicly stated positions. In addition, their positions are conveyed by means of four brief quotations about them which are attributed to the National Right to Life Committee ("NRLC") and the National Abortion Rights Action League ("NARAL"). With respect to Mr. Bush, the opinion from NRLC is that he "has been a consistent supporter of pro-life efforts," while the NARAL view is that he "is anti-choice and supports President Reagan's opposition to abortion." For Mr. Dukakis, the NRLC assessment is: "This is the most pro-abortion presidential ticket in history." The NARAL opinion indicates that Mr. Dukakis "has been a consistent and strong supporter of reproductive rights for women."

Your request includes the above-described 1984 and 1988 MRLC newsletters and various other documents pertaining to the activities of MRLC including its sources of funding and its fund-raising solicitations. You indicate that MRLC proposes to continue publishing similar newsletters with costs paid from its general treasury funds, not by MRLCPAC. You explicitly state that MRLC expects to publish a voter guide survey issue in May 1990, just before the June primary election in Maine. You request an advisory opinion as to whether the Act and Commission regulations prohibit or permit this proposed activity.

The Act generally prohibits any corporaton from using its corporate treasury funds to make "a contribution or expenditure in connection with any [Federal] election." 2 U.S.C. § 441b(a). However, the Act does permit a corporation to use its corporate treasury funds to administer a separate segregated fund that will be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Such a fund is a political committee and, like other political committees, is subject to the Act's recordkeeping and reporting requirements. 2 U.S.C. § 431(4)(B); see generally 2 U.S.C. §§ 432-434.

In a 1986 decision, the United States Supreme Court held that the First Amendment precluded application of 2 U.S.C. § 441b to require a small, informally organized, incorporated advocacy group to finance its independent expenditures from a separate segregated fund. *FEC* v. *Massachusetts Citizens for Life* ("MCFL"), 479 U.S. 238 (1986). The holding in *MCFL* was explicitly limited to incorporated advocacy groups that satisfy a three part test, including the requirement that the corporation was not established by a business corporation and had a firm policy against accepting funds from business corporations. *Id.* at 263-264. Furthermore, in *MCFL*, the Court concluded that the administrative and financial burdens of establishing a separate segregated fund for election expenditures would impermissibly discourage some small, informal corporation from engaging in any political speech.

Your request indicates that MRLC has accepted funds from business corporations in the past. It also has a current policy of actively soliciting and accepting such funds whether in the form of donations or the purchase of advertising space in its bi-monthly

newsletter. For these reasons MRLC does not qualify for the limited exception from 2 U.S.C. § 441b carved out in the cited *MCFL* opinion. See Advisory Opinions 1988-22 and 1987-7. Accordingly, MRLC is subject to the prohibitions of 2 U.S.C. § 441b.[3]

Section 441b prohibits both contributions and expenditures in connection with any Federal election. 2 U.S.C. § 441b(a),(b)(2) and 11 CFR 114.2(b). Commission regulations provide, however, that expenditures by corporations for certain specific nonpartisan activities conducted in connection with Federal elections are not prohibited by the Act. 11 CFR 114.4(b), see 2 U.S.C. § 431(9)(B)(ii).

Given the factual context you present, the regulations most relevant here permit a corporation to prepare, and distribute to the general public, nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. 11 CFR 114.4(b)(5)(i). The regulations set out several factors for deciding whether a voter guide is

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[3] The United States Supreme Court heard oral argument on October 31, 1989, in an appeal from the United States Court of Appeals decision in *Michigan State Chamber of Commerce* v. *Austin*, 856 F.2d 783 (6th Cir. 1988), *appeal pending, sub nom.* No. 88-1569. The Sixth Circuit had decided that, based on *MCFL*, it was unconstitutional for a Michigan statute to prohibit the Michigan Chamber from using its general funds to buy a newspaper advertisement supporting a state candidate, even though more than 75% of the Chamber's treasury consisted of funds received from business corporation members. The Supreme Court's decision on this appeal could affect the conclusions of this advisory opinion. That effect, if any, may be determined through the submission by MRLC of a new advisory opinion request after the Court's opinion is rendered.

nonpartisan. 11 CFR 114.4(b)(5)(i)(A) through (F).

Corporations that qualify as tax exempt organizations under § 501(c)(3) or (c)(4) of the Internal Revenue Code, and that do not support, endorse or oppose candidates or political parties, need not comply with these factors in preparing and distributing their voter guide materials, but such materials may not favor one candidate or political party over another. 11 CFR 114.4(b)(5)(ii). The Commission has previously held that a tax exempt corporation becomes an organization that supports, endorses, or opposes candidates if it establishes a separate segregated fund. Such a corporation must therefore comply with the cited guidelines if it prepares voter guide materials. Advisory Opinion 1984-17. Because MRLC has established MRLCPAC as a separate segregated fund that contributes to candidates for Federal office, MRLC must follow the nonpartisan voter guide requirements.

The regulations set forth several factors that the Commission may consider in determining whether a voter guide is nonpartisan. 11 CFR 114.4(b)(5)(i)(A), (i)(B), (i)(C), (i)(D), (i)(E), and (i)(F). Factor (C) states, in pertinent part, that the wording of the questions does not suggest or favor any position on the issues covered. Factor (D) provides that the guide expresses no editorial opinion concerning the issues presented, nor indicates any support or opposition to any candidate. The 1984 MRLC voter guide conforms with these nonpartisan factors, but the 1988 voter guide does not.

The 1984 candidate survey questions were limited only to abortion and "right to life" issues. Two ques-

tions asked the respondent candidates whether, if elected, they would vote for ratification of two specific constitutional amendments the texts of which were set forth in the questions. Two additional questions asked whether the candidates would vote in favor of legislation "to restore protection for the lives of unborn children" and to impose "restrictions on the use of public funds for abortion." Although MRLC's favored policy positions on these issues are apparent from its name, the title of its newsletter and from other articles in the newsletter containing the voter guide, the survey questions in context with the rest of the newsletter are not so explicitly partisan as to convert an otherwise nonpartisan voter guide into one that improperly conveys election messages and candidate advocacy. Compare Advisory Opinion 1984-17 where the newsletter, in addition to a voter guide, also included a report of specific candidate endorsements made by another organization and urged readers to favor those candidates when voting in the forthcoming election. See also Advisory 1987-7. In the situation presented here, however, neither the other parts of the newsletter, the introduction to the survey results, nor the results themselves, instruct the reader as to what the MRLC-preferred candidate response should be. The report identifies seven Federal candidates by name and political party affiliation, but each name is followed with the letters NR. These letters are defined to mean "No response: candidate did not respond to survey questionnaire." On the page next preceding the candidate survey results, the newsletter includes the general suggestion that "if a candidate in your area is listed as 'no response,' you may want to contact him or her personally."

The foregoing pertinent characteristics of the 1984 MRLC voter guide indicate that it satisfies the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4(b)(5)(i). As a result, MRLC expenditures for that guide, or for a 1990 MRLC voter guide which is materially indistinguishable from the 1984 voter guide, would not be prohibited corporate expenditures under 2 U.S.C. § 441b. See 2 U.S.C. § 437f(c)(1), see also Advisory Opinion 1984-17. By contrast and for the reasons discussed below, the 1988 general election voter guide submitted with your request does not satisfy the nonpartisan factors in Commission regulations, and expenditures by MRLC for that guide are prohibited by 2 U.S.C. § 441b.

The November 1988 "Election Issue" of the MRLC newsletter has a lower front page headline stating that Federal candidate surveys are enclosed. The front page also displays photos of both the Republican and Democrat presidential candidates along with several editorial opinions about their views on abortion. One opinion characterizes George Bush as "a consistent supporter of pro-life efforts," and another describes Michael Dukakis as a candidate on "the most pro-abortion presidential ticket in history." These presidential candidates were not, however, included in the candidate survey; they received no questions and provided no responses. See factors (A) and (B) in 11 CFR 114.4(b)(5)(i).

The candidate survey portion of the 1988 newsletter includes 10 questions prepared by the National Right to Life Committee only for Congressional candidates.[4] Four of these questions are posed in lan-

[4] The newsletter also included five separate questions that were sent to candidates for the Maine legislature as well as

guage explicitly indicating the favored "pro-life" response to the question. All questions are framed so that only a "yes" or "no" answer is expected. A bold-type message emphasizes: "PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question." [5] Six Federal candidates are listed, and four of them are designated as making no response to all ten survey questions. One candidate is designated as giving "yes" answers to all questions; another is shown as giving "no" answers to the first two questions and not answering the others.

The foregoing aspects of the 1988 voter guide are not in compliance with the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4 (b)(5)(i). As discussed with respect to the 1984 voter guide, factors (C) and (D) provide that, to assure a voter guide's nonpartisan character, the questions should not be worded in a manner that favors any position on the issue presented. In addition, no editorial opinions concerning the issues, or in addition, no editorial opinions concerning the issues, or in support or opposition to any candidates, should be included.

The 1988 voter guide includes several questions that are posed with explicit unambiguous references

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the responses (or non-responses) of those candidates. This portion of the voter guide does not present any issues with respect to application of 2 U.S.C. § 441b and Commission regulations at 11 CFR Part 114.

[5] In addition, a note or "Key" explaining how to interpret the symbols used to present the response of each named candidate states that the letter "Y" signifies a "Yes response to question, pro-life response".

to MRLC's positions on "pro-life" or "right to life" issues. Other references in the guide make clear that "yes" responses conform to the "right to life" position, and the survey response format does not allow for a responding candidate to explain a disfavored "no" response, or a non-response to one or more of the questions. The presidential candidate features on the front page of the 1988 voter guide are replete with partisan editorial references to the candidates' positions on abortion, reproductive choice, Federal funding of abortions, and a "Human Life Amendment" to the Constitution. The report of the 1988 Congressional candidate survey results identifies one candidate who responded in full agreement with the "right to life" position and one who responded contrary to that position; four other named candidates made no responses to the survey questions.

Accordingly, if the 1990 MRLC voter guide contains partisan election messages similar to those discussed above with regard to the 1988 voter guide issue, it may not be lawfully financed with the general treasury funds of MRLC or any other corporation. Such expenditures could, however, be made by a separate segregated fund established by MRLC, pursuant to 2 U.S.C. § 441b(b)(2)(C) and (b)(4)(C), provided the fund is comprised of voluntary contributions lawfully solicited and accepted in accordance with the Act and Commission regulations. Because you proposed that MRLC use its general treasury funds for the 1990 voter guide, and not contributions made to a separate segregated fund, this opinion does not express or imply any conclusions as to whether or not MRLCPAC satisfies the requirements of the Act and Commission regulations for the

lawful solicitation of contributions to a separate segregated fund.

One of your questions asks whether the so-called "press exemption" in the Act would apply to MRLC and permit it to make payments from general treasury funds for public distribution of its voter guide newsletters without regard to the prohibitions of 2 U.S.C. § 441b. The Commission answers this question in the negative. The Commission has previously concluded that the news media exception, 2 U.S.C. § 431(9)(B)(i), applies to a press entity engaged in the normal press-business of covering and commenting on political campaigns and requires that the press entity derive revenues from the sale of subscriptions (or single issues) and advertising. Advisory Opinion 1980-109; see also Advisory Opinions 1987-8, 1982-58, and 1980-90. MRLC prints 10,000 copies of each newsletter issue, and approximately 4,700 of these are mailed. The rest are hand distributed. Its public distribution of the newsletter is without charge. In addition, while MRLC's specific corporate purposes include publication and distribution of articles on particular subjects from a "prolife" viewpoint, MRLC is essentially a nonprofit, tax exempt corporation with charitable, social, benevolent, and educational purposes. It is not engaged in the news media business, and is not the type of entity contemplated by Congress when it adopted the cited press exemption in 1974. See Advisory Opinion 1980-109; also see *MCFL*, 479 U.S. 238, at 250, 251.

Finally, the Commission recognizes that "issues" numbered I, II, and III in your May 15, 1989 letter pose questions that are predicated on whether or not the MRLC voter guides "constitute express advo-

cacy." This advisory opinion explains the extent to which your proposed activity is permitted or prohibited by the Act and regulations. It addresses only the issues necessarily raised by 2 U.S.C. § 441b and relevant Commission regulations at 11 CFR 114.4 (b)(5).[6] The Commission has not interpreted the Court's decision in *MCFL* as requiring the Commission in all circumstances to determine whether a given election message constitutes "express advocacy" in applying 2 U.S.C. § 441b to corporate expenditures made in connection with Federal elections.

This response constitutes an advisory opinion concerning application of the Act of regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. § 437f.

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[6] Your letter of May 15, 1989, sets forth five specific "issues" on which you ask the Commission to issue an advisory opinion based on the facts presented. The Commission notes that its advisory opinions are rendered with respect to application of the Act and Commission regulations to a specific and prospective activity or transaction proposed by the requesting person. 2 U.S.C. § 437f(a)(1), 11 CFR 112.1(a) and 112.1(b). The Commission has the discretion to identify for itself those legal issues which are raised by a given factual situation presented in an advisory opinion request, and it decides whether and how those issues should be addressed in the advisory opinion. While the Commission's formulation of the legal issues presented may frequently correspond with those expressly posed by a requester, that is neither required, nor always the case.

Sincerely,

/s/ Lee Ann Elliott
LEE ANN ELLIOTT
Chairman for the
Federal Election Commission

Enclosures (AOs 1988-22, 1987-8, 1987-7, 1984-17, 1982-58, 1980-109, and 1980-90)

P.S. Chairman Elliott and Commissioner Aikens voted to approve this opinion and will file concurring opinions at a later date.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 296540 62119

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(2)

No. 90-1923

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

SANDRA KEEFER, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether 11 C.F.R. § 114.4(b)(5)(i), a Federal Election Commission regulation which prohibits "wording . . . questions presented . . . [to] favor any position on the issues covered" and "express[ing an] editorial opinion concerning the issues presented" in a corporate-funded, issue-oriented voter guide, has a statutory basis in 2 U.S.C. § 441b, which has been authoritatively interpreted by this Court to not encompass issue advocacy but to prohibit "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."

2. If these regulations found at 11 C.F.R. § 114.4(b)(5)(i) do have a statutory basis in 2 U.S.C. § 441b, whether 2 U.S.C. § 441b unconstitutionally violates first amendment rights of free expression by overbroadly restricting issue advocacy along with election advocacy, and fourteenth amendment rights of due process, by defining too vaguely the line between permissible and impermissible speech.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Maine Right to Life Committee, Inc., the Respondent not named in the style of this case, discloses that it has no parent companies, no subsidiaries, and no affiliates that have issued shares to the public.

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No. 90-1923

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

SANDRA KEEFER, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Maine Right to Life, Inc. and Sandra Keefer (known as Sandra Faucher prior to her recent marriage) respectfully ask this Court to deny a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in *Sandra Faucher, et al. v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991).

REASONS FOR DENYING THE WRIT

In determining whether to grant a petition for a writ of *certiorari*, this Court traditionally assesses the case by three criteria. First, whether there is error in the decision below. Second, whether the case involves a conflict between lower

jurisdictions or with a prior decision of this Court. Third, whether the case is of special importance.

In the case at bar, there is, first, no error below for the Court of Appeals correctly followed the decision of this Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), by declaring a regulation of the FEC — regulating corporate *issue* advocacy — to be beyond the authority of 2 U.S.C. § 441b.

The core of this case may be briefly summarized:

(1) In *MCFL*, this Court dealt with the issue of voter guides paid for by corporate funds, as in the case at bar.

(2) In this context of considering voter guides, the *MCFL* Court authoritatively construed § 441b (a statute prohibiting most corporate expenditures in connection with federal elections) and held that § 441b does not not reach the advocacy of *issues*, which is protected by the first amendment: "We therefore hold that an expenditure must constitute 'express advocacy [of the election or defeat of a clearly identified candidate for federal office]' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249.

(3) Despite *MCFL*'s holding that § 441b does not reach issue advocacy — decided in the context of considering voter guides — the FEC has refused to alter two regulations which limit issue advocacy in voter guides and which rely on § 441b for authority. These regulations require that a voter guide published with corporate funds "not suggest or favor any position on the *issues* covered" and "express[] no editorial opinion concerning the *issues* presented." 11 C.F.R. § 114.4(b)(5)(i) (emphasis added).

The decision below correctly followed *MCFL* and held, under authority of the Administrative Procedure Act, that these regulations exceeded the authority of § 441b and were therefore void.

Second, there is no decisional conflict — either among jurisdictions or with a prior decision of this Court — because the

lower courts have correctly followed the decision of this Court in *MCFL*.

Third, this case has no special importance because this Court has already firmly established that there may be no regulation of corporate issue advocacy under 2 U.S.C. § 441b because of the first amendment of the United States Constitution.

Thus, there being no error, conflict, or special importance in this case, the Petition for a Writ of *Certiorari* herein ought to be denied.

I. THERE WAS NO ERROR IN THE DECISION BELOW, WHICH CORRECTLY HELD THAT § 441B DOES NOT GOVERN ISSUE ADVOCACY SO THAT REGULATIONS GOVERNING ISSUE ADVOCACY ARE BEYOND THE SCOPE OF THAT STATUTE.

The FEC devotes the major portion of its Petition to discussing the legislative history of § 441b. In sum, the FEC claims that this history shows "that Congress did not intend to limit the application of section 441b to expenditures for 'express advocacy.'" Petition at 12. The FEC further argues that this interpretation at which it has arrived is entitled to substantial deference and that the standard of review is whether the regulation is "'a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent.'" Petition at 17 (citation omitted).

However, the FEC's line of argument ignores two key points. First, this Court has handed down a long line of cases which set forth the strong constitutional protection for political speech and especially for vigorous issue advocacy. Second, this Court has already authoritatively interpreted § 441b — taking into account its legislative history and the requirements of the Constitution — to prohibit only express advocacy of the election or defeat of a federal candidate and not to prohibit issue-oriented speech.

Therefore, no deference is to be afforded to any FEC inter-

pretation of § 441b which is at odds with the interpretation already authoritatively made by this Court. Moreover, any regulation must be a plausible construction of § 441b *as interpreted by this Court*. The regulation at issue herein exceeds the authority of the FEC under § 441b by expressly forbidding activity which this Court has declared to be expressly protected by the Constitution and therefore not prohibited by 2 U.S.C. § 441b, namely, issue advocacy.

A. *This Court Has Recognized Strong Constitutional Protection for Corporate, Issue-Oriented Speech and Has Only Permitted Restrictions of Corporate Speech Where It Expressly Advocates the Election or Defeat of a Clearly Identified Federal Candidate.*

This Court has long and carefully watched over efforts by Congress to regulate corporate political speech to be certain that the guarantees of the first amendment are not denied to corporations. This is so because restrictions on corporate political speech "limit political expression 'at the core of our electoral process and of First Amendment freedoms.'" *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

Not only has this Court recognized strong constitutional protection for corporate political speech in general — including the right to urge the election or defeat of a candidate — it has recognized as inviolable the right of corporations to engage in issue-oriented speech. Thus, government may regulate corporate speech urging the election or defeat of a clearly identified candidate only because this Court has recognized sufficient compelling state interests to justify narrowly drawn laws in this area. However, government may not regulate issue-oriented speech. This is clear from a number of Supreme Court decisions, including *United States v. Congress of Industrial Organizations (C.I.O.)*, 335 U.S. 106, 121 (1948) ("If § 313 [barring corporations from making 'any expenditure in connection with a federal election'] were construed to prohibit the publica-

tion, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."), and *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

Buckley dealt, inter alia, with a provision which limited "'any expenditure . . . relative to a clearly identified candidate.'" *Buckley*, 424 U.S. at 41 (quoting 2 U.S.C. § 608(e)(1)). The provision placed a limit on the amount of an independent expenditure on behalf of a candidate. However, this provision was considered to be unconstitutionally vague. *Buckley*, 424 U.S. at 41. Therefore, this Court construed it with another provision of the same statute to require "'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate." *Id.* at 42. The *Buckley* Court noted that

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. Thus, this Court continued, a speaker might never be fully certain that "words intended and designed to fall short of invitation" would be so construed by a listener. *Id.* at 43. As a result, "[s]uch a distinction offers no security for free discussion." *Id.*

Because of the problem described, the *Buckley* Court settled on the "express advocacy" test as marking the demarcation line between the permitted and the forbidden. This test is constitutionally mandated because only a statute prohibiting the express advocacy of a clearly identified federal candidate has a sufficiently bright line of distinction to make it constitu-

tionally defensible. This Court, in *Buckley*, explained the problem with a quotation from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some one as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43. Thus, this Court, in *Buckley*, said that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) [placing a ceiling on independent expenditures] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.*

Without such a clear line of demarcation, then, a speaker is forced to "hedge and trim" comments made on issues of public importance for fear he will be charged with forbidden electioneering. This is too heavy a burden on first amendment rights to be constitutionally permitted.

The *Buckley* Court concluded that "[t]he constitutional deficiencies" of such unclear statutory language could only be cured by reading the statute "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for a public office." *Id.* at 44. This Court added that "[t]his construction would restrict the application of § 608(e)(1) to communications containing

express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

The *Buckley* Court proceeded to determine whether the statute, "even as thus narrowly and explicitly construed, impermissibly burdens the constitutional right of free expression." *Id.* at 44. This Court determined that the government could not advance an interest in support of the statute sufficient to "satisfy the exacting scrutiny applicable to limitations on core First Amendment right of political expression." *Id.* at 44-45. The *Buckley* Court expanded on the subject of the first amendment's powerful protection of political speech:

> [T]he First Amendment right to "'speak one's mind . . . on all public institutions'" includes the right to engage in "'vigorous advocacy' no less than 'abstract discussion.'" Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.

Id. at 48 (citations omitted) (ellipsis in original). The *Buckley* Court also quoted approvingly the comments of the United States Court of Appeals for the District of Columbia, which it affirmed:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

Id. at 42 n.50 (quoting 171 U.S. App. D.C. 172, 226, 519 F.2d 821, 875 (D.C. Cir. 1975)).

From this line of cases, it is clear that the Constitution affords strong protection to corporate speech on political matters — even speech advocating the election or defeat of a clearly

identified candidate. The first amendment guarantees are so strong that government may only regulate such speech if it has a compelling interest, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), and the regulation "must employ means 'closely drawn to avoid unnecessary abridgment.'" *Id.* at 786 (quoting *Buckley*, 424 U.S. at 25). If the Constitution protects even express advocacy, then a *fortiori* it protects issue advocacy. From the above history, it is clear that this Court has never recognized as constitutional any infringement on the right of corporations to engage in vigorous advocacy concerning issues of public concern.

In 1986, this Court again considered the constitutional protection afforded corporate political speech, and issue advocacy in particular, in the case of *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238. In *MCFL*, this Court considered the contention of Massachusetts Citizens for Life, Inc. "that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," relying on *Buckley v. Valeo*. *MCFL*, 479 U.S. at 428. The focus of the contention was voter guides.

Noting that corporate independent expenditures "constitute expression at the core of our electoral process and of the First Amendment freedoms," *id.* at 251 (quotation marks and citations omitted), the strict scrutiny to which burdens on first amendment rights are subjected, *id.* at 257, and the compelling state interest which government must show to justify such a burden, *id.* at 252, this Court held that § 441b was governed by the express advocacy test: "We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249.

Thus, in *MCFL*, this Court extended the *Buckley* rationale to restrictions on independent expenditures in the context of considering voter guides. *Id.* at 249. This Court said that if a ceiling on independent expenditures, at issue in *Buckley*, had to be construed to apply only to express advocacy of the elec-

tion or defeat of a clearly identified candidate (in order to eliminate the constitutional deficiencies described in *Buckley*), "this rationale requires a similar construction of the more intrusive provision [at issue in *MCFL*] that directly regulates independent spending." *MCFL*, 479 U.S. at 249.

In sum, this Court has never recognized a compelling interest which would justify regulation of issue advocacy. Rather, it has held that the right to vigorously advocate issues is sacrosanct. Therefore, corporate issue advocacy must be given a sufficiently wide berth to guarantee that corporations will feel free to exercise their constitutional right of free speech. *Buckley*, 424 U.S. at 78. Moreover, where government regulates near to this sacrosanct area, it must employ the bright line of demarcation between the permissible and impermissible set forth in *Buckley* and *MCFL*.

This bright line is marked by two key points which must be observed before speech may be restricted under 2 U.S.C. § 441b. First, express advocacy must indeed be *express*. *Implied* advocacy may not be regulated. Second, the advocacy must be *election oriented* and *not issue oriented* to be the type of advocacy contemplated by the express advocacy test. Even where there is election advocacy, it must be of a *clearly identified candidate*. Before advocacy may be regulated under 2 U.S.C. § 441b or any regulations thereunder, both of these conditions must be met. The advocacy must be truly *express* and it *must urge the election or defeat of a clearly identified candidate*. As shall be seen, the FEC regulation herein transgresses on both these points, seeking to regulate *implied* advocacy of *issues*, rather than express advocacy of the election or defeat of a clearly identified candidate for federal office.

B. *2 U.S.C. § 441b Has Been Authoritatively Interpreted by This Court to Prohibit Only Corporate Expenditures Expressly Advocating the Election or Defeat of a Clearly Identified Federal Candidate.*

1. This Court Has Determined That § 441b Applies Only to Express Advocacy.

In its discussion of the legislative history of § 441b, the FEC seeks to convince this Court that the statute should be construed to permit regulation of corporate issue advocacy. However, this Court has already authoritatively interpreted § 441b to prohibit only express advocacy of the election or defeat of a clearly identified candidate for federal office.

The FEC asserts that "no court may 'judicially rewrit[e]' a statute to avoid constitutional questions." Petition at 11 (citation omitted). However, this Court does have the power to authoritatively construe federal statutes. *See, e.g., Chevron, U.S.A. v. Natural Resources Defense*, 467 U.S. 837, 843 (1984) ("The judiciary is the final authority on issues of statutory construction . . . ."). It has long been this Court's practice to do so in cases, such as *Buckley* and *MCFL*, where severe questions arise as to the constitutionality of a federal statute. Justice Holmes, in his famous dissent in *Ashwander v. TVA*, 297 U.S. 288, 348 (1936), summarized this principle of avoiding constitutional questions by statutory construction and cited cases where it had been applied.

In construing § 441b, this Court has construed it not to prohibit issue advocacy. This Court construed § 441b as governing only the express advocacy of a clearly identified candidate for federal office. This Court has already taken into account the legislative history of § 441b, its plain language, its context, and the requirements of the first amendment in making its authoritative construction in *MCFL*.

2. This Interpretation Is Not Contrary to Congressional Intent.

The FEC insists that this Court's construction of § 441b is erroneous because "[t]he language, history, structure, and purposes of 2 U.S.C. § 441b clearly establish that Congress intended it to regulate some expenditures by corporations that do not involve 'express advocacy.'" Petition at 11. However, the FEC makes much of little in the legislative history and ignores the clear intention of Congress to govern only express advocacy in the same history.

By its multiple citations, the FEC makes the legislative history on voter guides appear more expansive than it really is. Petition at 12-15. In reality, actual discussion of voter guides is very brief. Moreover, the discussion is inconclusive and capable of multiple interpretations. Senator Ball, declared that he "did not think there is a single thing in the bill which prohibits any union or corporation . . . from publishing any public official's voting record" because "that is not a campaign for or against a candidate." Senator Taft intimated that, in his mind, a voter guide which "was merely a bare statement of actual facts and simply direct quotations . . . and was not colored in any way" might be lawful under the statute. However, he did not expand on the meaning of the term "colored" — whether he meant colored by partisan, express advocacy of the election or defeat of a clearly identified federal candidate or colored by issue advocacy. Senator Pepper responded to Sen. Taft that "[t]he language is 'in connection with.' The provision does not contain any statement as to whether the statement is colored or not." Senator Taft concluded the discussion by noting that the question was "not very practical . . . because no one would do just that. Either it is an argument for him or against him, or it is not." 93 Cong. Rec. 6447 (1947). Thus, there was disagreement among the Senators on how the statute would apply to voter guides. From these statements alone, no conclusive legislative intent may be discerned.

However, by examining the context in which these statements occurred, one will discover that this discussion of "colored" voter guides occured amid a strong emphasis on the advocacy of parties or candidates, rather than issues. For example, after the opening questions about voter guides, the discussion immediately shifted to union- or corporate-sponsored news commentators who might color the news in a color favorable to their organization. Mr. Taft declared, "If the General Motors Corp. had a man speaking on the radio every week to advocate the election of a Republican or a Democratic Presidential candidate . . . it would be punished under the law." *Id.* This context makes clear that the "coloring" which was of concern was not issue advocacy, but, rather, advocacy of the election or defeat of a clearly identified candidate from one party or the other on the basis of party affiliation or loyalty to the candidate and not on the basis of ideological orientation with regard to issues being advocated.

This context of expressly advocating the election or defeat of a clearly identified candidate (or party) rather than advocating an issue for which a candidate happens to stand is also evident in the other section of the Congressional Record cited by the FEC. Petition at 13. In describing his amendment, chief house sponsor Rep. Hansen declared that "[t]he effect of this language is to . . . prohibit the use of . . . corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election." 117 Cong. Rec. 43,379 (1971). Further examination of Rep. Hansen's remarks demonstrates that his amendment was targeted at "partisan electioneering" or "partisan politicking," with "partisan" used in the sense of supporting one candidate or party, and not in the sense of supporting an issue with which certain candidates happen to be aligned. *Id.* at 43,379-84. Rep. Hansen concluded his long monologue by asserting that his amendment prohibited corporate expenditures "to reach the general public in support of, or in opposition to, Federal candidates . . . ." *Id.* at 43,381.

Reading these quotes, one must be struck by the close parallel in language with what this Court has held to be the lawful scope of § 441b, i.e., limiting the express advocacy of the election or defeat of a clearly identified candidate for federal office but not limiting issue advocacy in any way. *See also id.* at 43,383 (remarks of Rep. Hansen) (amendment prohibits "active electioneering on behalf of particular Federal candidates"); *id.* at 43,384 (remarks of Rep. Hansen) ("prohibit active electioneering" and "active public partisan politicking").

The FEC attempts to bolster its legislative history conclusion with other arguments: (1) that the language Congress used in § 441b is extremely broad as compared with other more narrow language used by Congress (Petition at 12, 15), and (2) that this Court's interpretation of § 441b would make provisions therein regulating voter registration and get-out-the-vote campaigns "superfluous" (Petition at 14-15).

While the language is broad, just how broad it is must be decided in light of the intent of Congress to enact constitutionally permissible legislation (thereby not attempting to restrict issue advocacy) and in light of the above legislative history (which indicates an intention not to regulate issue advocacy). It is well established that congressional action must be interpreted in the light of the contemporary legal context, and the assumption must be made that Congress was aware of constitutional requirements and intent on abiding by them. *NRLB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). At least by 1976, when Congress retained the provisions of § 441b while moving it from the criminal code to Title 2 and altering other provisions of the Act, Petition at 15, Congress must be presumed to have known that § 441b governed only express advocacy of the election or defeat of a clearly identified candidate and not issue advocacy which may be associated with some candidate. Congress would have been aware of the constitutional requirements in the area of election regulations from this

Court's decisions in, inter alia, *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948), and *Buckley*, 424 U.S. 1 (1976). Therefore, a mere assertion about the broadness of the language is meaningless. Congress would not have intended its statute to be broader than the Constitution allowed.

Nor is the fact that Congress narrowed other provisions after *Buckley* and did not narrow § 441b meaningful. Petition at 15. *Buckley* directly addressed the provisions which were changed, but it did not directly address § 441b or the FEC regulations at issue in this case. The problem, of course, is with the regulations — which go beyond the congressional intent and the permissible constitutional scope of § 441b — and not with § 441b itself. Congress doubtless saw no problem with § 441b itself — especially as it had been authoritatively construed by this Court to avoid constitutional difficulty — and changing the regulations is the duty of the FEC not Congress. There is no need to alter § 441b to alter the regulations and bring them into conformity with this Court's construction of § 441b.

As to the claimed superfluity of § 441b(b)(2)(B) which provides for "nonpartisan" registration and get-out-the-vote drives, a simple examination of the statute resolves the problem perceived by the FEC. The FEC argues that "by definition" these "nonpartisan" activities "could never involve express advocacy of a candidate's election or defeat." Petition at 15. The FEC argument is that these activities would already be permitted because they do not involve express advocacy of the election or defeat of a clearly identified federal candidate. However, this argument ignores the plain language of the statute. Section 441b forbids corporate (and union) contributions or expenditures "*in connection with*" any federal election. 2 U.S.C. § 441b(a) (emphasis added). Registering people to vote and taking people to the polls are quintessential political activities done *in connection with* elections. Registration and voter mobilization profoundly influence elections. But for

the exceptions allowed for them in § 441b, that statute would prohibit corporate or union expenditures for such activities. Just as voter registration and mobilization affect elections, so does corporate or union speech about candidates and issues raised in elections. The difference between the activities is that regulation of voter registration and mobilization does not raise first amendment concerns, while regulating union and corporate speech raises serious free speech issues. Thus, Congress may prohibit all corporate financial activity in connection with an election but decide to permit "nonpartisan" voter registration and mobilization without any first amendment concerns. However, Congress would have to intend to violate the first amendment to intend to regulate corporate or union speech about issues raised in in general public debate or in an election. This Court construed § 441b in a manner which assumed congressional compliance with constitutional mandates.

3. This Interpretation Was Not Obiter Dictum.

In an effort to avoid the authoritative construction of § 441b by this Court, the FEC calls the decision of this Court, construing § 441b to be governed by the express advocacy test, a mere dictum. Petition at 15-16. This is not supportable.

In *MCFL*, the First Circuit avoided the issue of whether § 441b must be interpreted to bar only express advocacy of the election or defeat of a clearly identified federal candidate (as *Buckley* seemed to require). That court stated:

> We do not decide whether the section 441b definition of expenditure includes an 'express advocacy' requirement, because we conclude, contrary to the district court, that the MCFL publication would fit within the definition of expenditure, even if an express advocacy requirement were incorporated into the definition.

MCFL, 769 F.2d 13, 20 (1985).

Although this Court, in *MCFL*, could have similarly avoided the issue — both because it found that there was express advocacy and because it held that MCFL-type organizations

could not be restricted from engaging in express advocacy — it did not do so. Rather, this Court held that § 441b was governed by the express advocacy test in the following words:

> We therefore ***hold*** that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b.

MCFL, 479 U.S. at 249 (emphasis added).

By contrast, this Court did not decide the issue of whether MCFL's newsletter fell within the exception to the corporate independent expenditure prohibition for periodical publications because MCFL's newsletter was not a regular edition of the newsletter. *Id.* at 250. Had this Court wished to avoid a holding that § 441b was governed by the express advocacy test, it had before it its own example with regard to the newspaper exception. That this Court expressly decided the issue was no mistake.

Rather, this Court felt it necessary to decide the issue of whether § 441 encompasses only express advocacy because of the analysis which it constructed — an analysis steadfastly resisted by the FEC. The test adopted by this Court is a sequential one. First, a court should determine whether or not a particular independent expenditure constitutes express advocacy. Second, if it does, then the court should determine whether the corporation making the expenditure is an MCFL-type organization and thus may engage in express advocacy. This is precisely the way the test was applied in *MCFL*. *Id.* at 248-65.[1]

Finally, it seems appropriate that when this Court expressly "holds" something, using that precise term, that decision

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[1] The United States District Court for the District of Columbia has held that the express advocacy test governs § 441b because of *MCFL*, and did not treat this Court's holding as a mere dictum. *Federal Election Commission v. National Organization of Women(NOW)*, 713 F. Supp. 428, 433 (D.D.C. 1989), *appeal pending* (D.C. Cir. No. 89-5230).

should be followed by a federal agency. It seems presumptuous of the FEC to claim that this Court, which has the last word on what it does and does not hold, has not held something when it expressly said that it did so.

However, this seems indicative of a mindset at the FEC. By contrast, Congress followed this Court's decision in Buckley and revised many of its statutes to conform with this Court's decrees in Buckley, even though Buckley's creation of the express advocacy test could have been declared mere obiter dictum in the same manner in which the FEC is treating this Court's pronouncement in *MCFL*.[2] Congress did not go looking for ways to avoid what this Court had decreed to be constitutionally necessary. However, the FEC continues to resist the requirement that the express advocacy test be incorporated in its regulations even after this Court's decision in *MCFL*.

4. Therefore, No Deference Should Be Afforded the FEC's Interpretation of § 441b.

The FEC's urgent plea for deference to its interpretation of 2 U.S.C. § 441b is misplaced. No deference can be afforded a

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[2] In *Buckley*, a predecessor statute (§ 608(e)(1) — which placed a ceiling on independent expenditures) to § 441b was construed by this Court "to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. However, this Court proceeded to hold that the statute — even as narrowed to avoid constitutional difficulties — was not justified by a compelling state interest. *Id.* at 44-51. Given the fact that the statute was unconstitutional under any construction which the Court could give it, the construction of the statute to reach only express advocacy was unnecessary to the decision, i.e., it was obiter dictum. However, no one but the FEC seems to believe that pronouncements of this Court in such settings may be ignored when they are not absolutely essential to a decision. Clearly, this Court sometimes gives guidance through its judicial commentary which may be dictum. However, where this Court has consistently over a long time asserted that vigorous issue advocacy may not be impinged upon and that the express advocacy test is essential to prevent such impingement, it seems evident that it means what it says and is not merely making comments by the way without adequate consideration.

statutory interpretation by a federal agency which flies in the face of an authoritative construction of the same statute by this Court.

C. *Because the FEC Regulations at Issue Herein Are Beyond the Authority of § 441b, They Are Void Under the Administrative Procedure Act.*

From the preceding material, it is clear that § 441b has been authoritatively construed by this Court to reach only express advocacy. Therefore, any regulation promulgated under the authority of 2 U.S.C. § 441b has authority only in so far as it regulates the express advocacy of the election or defeat of a clearly identified candidate. Conversely, any regulation which restricts issue advocacy in any way is ultra vires. The regulation of the FEC, at 11 C.F.R. § 114.4(b)(5)(i), goes far beyond regulation of express advocacy and expressly prohibits issue advocacy. The regulation was properly declared by the decision below to be beyond the power of the FEC under 2 U.S.C. § 441b and therefore void.

The regulation at 11 C.F.R. § 114.4(b)(5)(i) crosses the line created by this Court in two ways. First, it regulates *implied* rather than *express* advocacy. Second, it regulates advocacy of issues rather than of the *election or defeat* of clearly identified candidates. This is apparent in the provisions of the regulation, Petition at 35a-36a, which give factors employed by the FEC to determine whether a voter guide is "nonpartisan" and therefore permitted.

Preliminarily, it should be noted that the term "nonpartisan" itself is unobjectionable if properly defined. If "nonpartisan" were defined by the FEC in a limited manner to mean only that a voter guide may not expressly advocate the election or defeat of clearly identified candidate, the regulation would be authorized by 2 U.S.C. § 441b. However, in common use, a "partisan" is "a firm adherent to a party, faction, *cause* or person." *Webster's Ninth New Collegiate Dictionary* (1985) (emphasis added). Under this common usage, being nonpartisan would

require not only no promotion of candidates or parties, but also no espousal of causes, i.e., issues. Under this Court's authoritative interpretation of 2 U.S.C. § 441b, issue advocacy may not be restricted, so such a definition would be ultra vires. As set forth in the following discussion, the FEC has chosen a similarly unauthorized (and unconstitutional) definition of "nonpartisan."

The FEC's definition of "nonpartisan" is set forth in six factors, found at 11 C.F.R. § 114.4(b)(5)(i). Of these factors, two are clearly objectionable. These state:

> (C) The wording of the questions presented does not suggest or favor any position on the issues covered;
>
> (D) The voter guide expresses no editorial opinion concerning the issues presented nor does it indicate any support for or opposition to any candidate or political party.

11 C.F.R. § 114.4(b)(5)(i).

The first of these quoted factors clearly forbids a corporation from advocating one issue over another. It says that questions may not be worded to "suggest or favor any position on the issues covered." 11 C.F.R. § 114.4(b)(5)(i)(C). This is beyond the authority of 2 U.S.C. § 441b, which has been construed to protect *issue* advocacy. Nor would it be *express* advocacy of the election or defeat of a clearly identified candidate for a corporation to indicate its position on any issue discussed. To the extent that stating a corporation's position on an issue advocates a candidate's election or defeat rather than an issue, it would yet be only *implied* advocacy. Implied advocacy is not prohibited by 2 U.S.C. § 441b, only express advocacy.

The second of these quoted factors forbids the expression of any "editorial opinion concerning the issues presented." 11 C.F.R. § 114.4(b)(5)(i)(D). This, too, is a restriction on issue advocacy, which advocacy is constitutionally protected and outside the scope of what 2 U.S.C. § 441b prohibits.

The facts of the case at bar illustrate well the burden of this

unconstitutional and ultra vires restriction. Maine Right to Life Committee, Inc. (MRLC) publishes its voter guides in its regular newsletter. This is common among public interest corporations such as MRLC, due to financial necessity.[3] They have limited resources and cannot afford to regularly issue extra publications and make extra mailings, so they publish a voter guide within their newsletters. The FEC regulation forbids MRLC from making any editorial commentary on the issues it supports in the voter guide edition of its regular newsletter. Indeed, carried to its logical extreme, this regulation could be construed to prohibit organizations such as MRLC from publishing voter guides because its very name, Maine Right to Life Committee, Inc., suggests an opinion on the issues in its voter guide. This is a heavy burden on free speech which is not authorized by 2 U.S.C. § 441b.

The FEC argues that even if the "dictum" *of MCFL* were to be followed, voter guides are sufficiently unique to justify a regulation restricting issue advocacy. Petition at 17-22. However, *MCFL* was decided precisely in the context of considering a voter guide. Thus, this is not a case of first impression. To now hold that the express advocacy test does not apply to voter guides, this Court would have to overrule *MCFL*.

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[3] Among public interest corporations such as MRLC, political action committee (PAC) funds are also commonly limited, even more so than general treasury funds. MRLC is supported by the grass-roots contributions of common citizens; only an insignificant portion of MRLC's general treasury funds are received from other corporations. Petition at 14a. In order for such public interest corporations to exercise their constitutional right to express opinions on both whom should be elected (a PAC activity) and what issues should be supported (a corporate activity), most organizations must spend PAC funds only on matters strictly pertaining to elections of candidates and use other moneys for issue advocacy. As a result, the corporation's free speech is limited if it must spend PAC funds on issue advocacy, which this Court has determined may be funded by general treasury funds. Therefore, it is not enough for the FEC to simply say that MRLC can publish its voter guide with funds of its PAC. Petition at 21. MRLC may not be forced to pay for constitutionally-protected issue advocacy out of its limited PAC funds.

The FEC claims that its voter guide regulation "comports with th[e *Buckley*] approach," i.e., the express advocacy test. Petition at 19. The purpose of the *Buckley* express advocacy test, according to the FEC, is "to exclude from the provisions' coverage communications devoted to issues that are closely associated with particular politicians who are candidates, since discussion of such issues often includes references to those candidates." *Id.*

The FEC then claims that its regulation follows *Buckley* "by narrowly defining a particular type of expenditure that is unambiguously election related." Petition at 19. The FEC continues, "[I]ssues are presented in such a guide as a basis for choosing among the candidates, not to promote a position on the issues themselves." Petition at 19-20. The FEC fails to understand that issue advocacy is not merely "to promote a position on the issues" but to promote the ascendency of an issue in the marketplace of ideas. This requires that candidates be identified who support those issues. This is best done in the context of a voter guide. However, in the process of identifying which candidates support which issues, a corporation ought not to be to be restricted from simultaneously expressing an opinion on the issues. Both activities are motivated by constitutionally-protected advocacy of issues. This is distinct from promoting or opposing a candidate or a party out of loyalty or opposition to the candidate or the party.

The distinction which the FEC misses was plainly made in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), wherein the 9th Circuit noted that just because a corporation strongly advocates an issue at election time, which is identified favorably or negatively with certain candidates, does not mean that this advocacy is forbidden electioneering. More to the point, a corporate voter guide which is clearly partisan as to an issue is not express advocacy of the election or defeat of a clearly identified candidate. This is made clear in *Furgatch*, which found that an ad discussing the demerits of then-President Carter

> was not issue-oriented speech of the sort that the Supreme Court was careful to distinguish in *Buckley*, and the Second Circuit found to be excluded from the coverage of the Act in *Central Long Island Tax Reform*. The ad directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was intended to cover.

Id. at 865 (emphasis added).

By contrast, most voter guides are issue oriented. They address a narrow range of issues of special interest to the corporation. What is promoted in such voter guides is clearly these issues, not particular candidates. That it may be clear that the corporation favors candidates which agree with its positions and does not favor candidates which disagree with its positions is a direct result of the advocacy of the issues and not any predisposition — on some non-issue-related basis — toward any candidate. Thus, even partisan voter guides are protected speech, as long as they do not expressly advocate — in the real and strict meaning of that term as set forth in *MCFL* and *Buckley* the election or defeat of a clearly identified federal candidate.

It was precisely because issue advocacy might be hard to distinguish from electioneering that the express advocacy test was created. This Court in *Buckley* relied on this rationale when it created the express advocacy test:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42.

The FEC's conception is that all corporate speech which may in any way influence an election is forbidden unless it is specially permitted by statute or regulation. This Court has the opposite conception, namely, that all corporate speech is permitted unless it may be constitutionally forbidden. This is because corporate political speech — even speech expressly urging the election or defeat of a clearly identified candidate — is constitutionally protected under the first amendment and may only be abridged by a narrowly tailored restriction which is supported by a compelling interest. *Buckley*, 424 U.S. at 48. Within the sphere of protected speech, this Court has recognized only one type of corporate political speech for which there is a compelling state interest sufficient to justify a restriction on a corporation's free speech — expressly advocating the election or defeat of a clearly identified federal candidate.

The FEC believes that the motivation of the corporate speaker may be examined and form the basis for restricting corporate speech on issues, i.e., if the motive for the voter guide is really to affect federal elections and this particular voter guide is particularly influential in doing so then it may be restricted. But motivation is irrelevant according to the holding of this Court in *MCFL* and elsewhere, for the focus must be on what has actually been said. The approach of the FEC — that one may search for motive in regulating campaign activities — would be impossible to cabin. For example, suppose the President engages in July 4th activities or in a parade to honors troops engaged in Dessert Storm with the motivation of winning the coming election. Are his parading activities and expenses governed by the federal election laws? Of course, they are not. The FEC's approach to governing corporate issue advocacy is to say that if the advocacy is relatively ineffective it need not be restricted, but if the issue advocacy is vigorous and done in the most effective manner possible it may be restricted by the FEC.

Once the proper foundation is laid, it becomes evident that no regulation limiting issue advocacy can stand. This Court has

taken special pains to protect issue advocacy in the thick of political debate and has created the express advocacy test as the line of demarcation to separate election advocacy from issue advocacy when the lines become blurry. The FEC has made every effort to breach the line created by this Court and to eliminate issue advocacy where it may influence an election.

In sum, the FEC has not only failed to give substantial berth to constitutionally-protected corporate free expression, it has actually prohibited corporate issue advocacy by requiring that voter guides published by corporations be "nonpartisan" and defining "partisan" to include issue advocacy. Because this Court has authoritatively interpreted § 441b as not prohibiting issue advocacy — to avoid the obvious violation of first amendment guaranteed free expression — the FEC regulations at issue herein are without statutory authority. Therefore, the district court properly declared them void under the Administrative Procedure Act.

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT OR OTHER COURTS, WHICH HAVE ALL HELD THAT GOVERNMENT REGULATION OF ISSUE ADVOCACY IS CONSTITUTIONALLY PROHIBITED.

Just as there is no conflict between the decision below and the decision of this Court in *MCFL*, there is no conflict between the decision below and decisions of other jurisdictions.[4]

The United States Court of Appeals for the Ninth Circuit followed this Court's express advocacy test in *Federal Election*

[4] The FEC insists that the following two cases are irrelevant to the debate because "both of [them] construed statutory provisions that Congress did not limit [in 1976 after *Buckley*] to expenditures for express advocacy." Petition at 15 n.8. This is merely a return to the FEC argument that Congress intended § 441b to govern issue advocacy because it did not modify § 441b when it modified the provisions at issues in those cases. This argument has already been dealt with in this Brief. These cases are on point in demonstrating how lower courts are consistently following and applying this Court's express advocacy test.

Commission v. Furgatch. 807 F.2d 857 (9th Cir. 1987), cert.denied, 484 U.S. 850 (1987), noting that this "Court was particularly insistent that a clear distinction be made between 'issue discussion,' which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act." *Id.* 860 (citations omitted).

Likewise, the Second Circuit, in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee (CLITRIM)*, 616 F.2d 45 (2d Cir. 1980) (en banc) (per curiam), followed the express advocacy test of *Buckley* in construing two statutes.

In following these cases, the decision below has created no split in the jurisdictions. Rather, all agree with this Court that government may not limit issue advocacy by corporations.

III. This Case Has No Special Significance Making It Worthy of a Writ of *Certiorari*.

Because the decision below followed well-established law declared by this Court, there is no special significance to this case making it worthy of a writ of *certiorari*. There is no novel question of law. Indeed, *MCFL* reaffirmed the "express advocacy" test in the very context of regulations on voter guides — which the FEC now wants to declare as unique. The FEC has simply refused to be governed by the plain and simple "express advocacy" test declared by this Court and other courts in a series of cases over an extended period of time. What the FEC needs to do now is to comply with the dictates of this Court by promulgating new regulations in light of this Court's decision in *MCFL*.

IV. If the FEC Regulations Are Not Beyond the Authority of 2 U.S.C. § 441b, Then § 441b Violates the Constitution by Overbroadly and Vaguely Restricting Issue Advocacy Along With Election Advocacy.

Respondents have relied on this Court's construction of

§ 441b, in *MCFL*, which declared that § 441b does not prohibit issue advocacy in any fashion. This Court so construed § 441b to avoid severe constitutional questions of vagueness and overbreadth. This Court's construction of § 441b served as the basis of the decisions below. If, however, this Court should now decide to follow the FEC's urging and alter its interpretation of § 441b so that it governs issue advocacy, then those severe constitutional questions must be addressed. Respondents are entitled to defend their favorable decision below on any basis. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Moreover, the express advocacy test was built by this Court on the foundation of avoiding constitutional claims by statutory construction. If this Court were to now decide to alter that approach, then the constitutionality of § 441b under the overbreadth doctrine of the first amendment and the vagueness doctrine of the fourteenth amendment would necessarily need to be addressed in this case. This may be avoided by following the statutory construction of § 441b announced by this Court in *MCFL*, making void the regulations of the FEC which forbid a corporation to advocate issues in a voter guide.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

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July 22, 1991